Petition

81-1687

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No. .....
IN THE

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

DEAN C. DUNLAVEY,
(Counsel of Record),
DONALD E. SLOAN,
GIBSON, DUNN & CRUTCHER,
515 South Flower Street,
Los Angeles, Calif. 90071,
(213) 488-7000,
Attorneys for Petitioners Sony Corporation of America, et al.

Of Counsel:
MARSHALL RUTTER,
RUTTER, EBBERT & O'SULLIVAN,
Suite 2200,
1900 Avenue of the Stars,
Los Angeles, Calif. 90067,
(213) 879-9494.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Is reception at home by videotape recorder (followed only by private viewing at home) of free off-the-air television programming an infringement of statutory copyright on such programming?

2. If the answer to Question No. 1 is "Yes", does the manufacture, sale and/or advertisement of a home videotape recorder *per se* constitute contributory infringement whenever that videotape recorder is used for such reception at home?

3. Is "fair use" of a copyrighted work (17 U.S.C. § 107) limited to a "productive use", and precluded from being an "intrinsic use"?

4. Can a federal court impose a compulsory license on a copyright owner, and impose continuing royalties on an infringer, as a remedy for statutory copyright infringement?

5. By totally ignoring the findings of fact of the district court, and by holding retailers liable for contributory infringement when they never were alleged to have such liability, did the Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

The parties to the proceedings below are UNIVERSAL CITY STUDIOS, INC., a corporation, and WALT DISNEY PRODUCTIONS, a corporation, Respondents herein, Plaintiffs-Appellants below, v. SONY CORPORATION OF AMERICA, a corporation, SONY CORPORATION, a corporation, CARTER HAWLEY HALE STORES, INC., a corporation, ASSOCIATED DRY GOODS CORPORATION, a corporation, FEDERATED DEPARTMENT STORES, INC., a corporation, HENRY'S CAMERA CORPORATION, a corporation, DOYLE DANE BERNBACH, INC., a corporation, and WILLIAM GRIFFITHS, an individual, Petitioners herein (except Griffiths, who has no interest in the outcome of this petition or this case), Defendants-Appellees below.

The following petitioner-corporations have the following parent companies, partially-owned subsidiaries and/or affiliates.

Petitioner Sony Corporation has the following partially-owned subsidiaries: S-T Videocassette Duplicating Corp., Sony of Canada, Ltd., Sony de Venezuela, S.A., Sony Videobras Ltda., Sony Motoradio Comercio e Industria Ltda., Motoson Industria e Comercio Ltda., PMG Assurance Ltd., Sony Italia S.p.A., Brandsteder Electronics, B.V., Hispano Sony, S.A., Sony Danmark A/S, Fook Yuen Electronic Co., Ltd., Setron Electronics Pte. Ltd., Setron Electronics (Malaysia) Sdn., Bhd., Siedles Electronic Industries Limited, Orson Video Private Limited, Sony Saudi Arabian Company Ltd., Sony/PCL Inc., Aiwa Co., Ltd., Sony/Tektronix Corporation, CBS/Sony, Inc., Sony Eveready, Inc., Sony Prudential Life Insurance Co., Ltd., Sony/Wilson, Inc., Sony Taiyo Co., Ltd., Sowa Co., Ltd., Micronesian I Co., Ltd., Shibason Co., Ltd., Kyodo Security Agency Co., Ltd., Build Co., Ltd., Tokyo First Developing Co., Ltd., Hard and Soft Co., Ltd., CBS/SONY Family Club Inc., April Music Inc., CBS/SONY Record Inc., EPIC/SONY, Inc., CBS/SONY Publishing Co., Ltd., Japan Record Distribution Systems, Inc., Music Plaza Co., Ltd., CBS/SONY California Inc., CBS/SONY Hong Kong Ltd., Niigata Sowa Co., Ltd., Korea Sowa Co., Ltd., Kohki Co., Ltd., Korea Daitoh Electronics Ind. Co., Ltd., Korea Electronics Parts Ind. Co., Ltd.

Petitioner Carter Hawley Hale Stores, Inc. has the following partially-owned subsidiary: John Wanamaker Liberty Street, Inc.

Except as aforesaid, no petitioner has any parent company, subsidiary (except wholly owned subsidiaries) or affiliate within the meaning of Supreme Court Rule 28.1.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Sony Corporation ("Sony" — manufacturer of a videotape recorder, or "VTR", called Betamax), Sony Corporation of America ("Sonam" — Sony's wholly-owned subsidiary, distributor of Betamax), Doyle Dane Bernbach, Inc. ("DDBI" — Sonam's former national advertising agency for Betamax), and four Betamax retailers Carter Hawley Hale Stores, Inc., Associated Dry Goods Corporation, Federated Department Stores, Inc. and Henry's Camera Corporation (the "VTR retailers"), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered in the above-entitled case on October 19, 1981.

Opinions Below.

The Opinion of the Court of Appeals rendered October 19, 1981 is reported at 659 F.2d 963 (9th Cir. 1981) — Appendix A hereto (cited herein as "Pet. App. 1 et seq."). The Opinion of the United States District Court for the Central District of California entered October 2, 1979 is reported at 480 F. Supp. 429 (C.D.Cal. 1979) — Appendix B hereto (cited herein as "Pet. App. 31 et seq.").

Jurisdiction.

The Judgment of the Court of Appeals was entered on October 19, 1981. A Petition for Rehearing with a Suggestion for Rehearing in Banc was timely filed on November 2, 1981. The Petition for Rehearing was denied by order dated January 12, 1982 — Appendix C hereto (Pet. App. 118). This Petition for Writ of Certiorari has been timely filed within ninety days thereafter (28 U.S.C. § 2101(c); Supreme Court Rule 20.2, .4). The jurisdiction of this Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

This case involves Article I, § 8, Cl. 8 of the United States Constitution and several provisions of the Copyright Act of 1909 (the "1909 Act") and the Copyright Revision Act of 1976 (the "1976 Act"), respectively, each of which is printed in full in Appendix D hereto (Pet. App. 119 et seq.). The pertinent provisions of the 1976 Act are 17 U.S.C. §§ 101 (portions), 106, 107, 411, 501, 502(a) and 504. The pertinent section of the 1909 Act is former 17 U.S.C. § 1 (portions).

Statement of the Case.

This is an action for alleged infringement of statutory copyright. Jurisdiction of the district court was invoked under 28 U.S.C. § 1338(a).

The Court of Appeals' opinion holds that all "home videorecording" of free off-the-air television broadcasts "constitutes copyright infringement", no matter the program, no matter that the recording is made "for private noncommercial use" (Pet. App. 12, 27, 30) — thereby branding over three million American families with home-use VTRs as lawbreakers and rendering them subject to all the potential liability that goes with direct infringement.[1]

The Court of Appeals' opinion also holds the manufacturers, distributors, retailers and national advertisers of home-use VTRs "legally responsible for the infringing activity" and "liable for such use" as contributory infringers

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[1]This is the first judicial decision in American legal history to find as copyright infringement either (a) conduct taking place entirely in the privacy of the home or (b) making a copy of anything solely for private personal use.

— for having done nothing more than to make VTRs available to the public for home use (Pet. App. 25, 27, 30, 97).[2]

The Court of Appeals directed the district court to consider granting the relief sought by respondents — viz., an injunction against the further sale of home use VTRs, as well as statutory damages ($250 minimum damages per infringement) assessed against petitioners for off-the-air home recordings made by VTR users (Pet. App. 28, 102-3; 17 U.S.C. §§ 502, 504; R.T. 3260, 3278). Alternatively, the Court of Appeals authorized the district court to create a "compulsory license" paid for with a "continuing royalty" — a remedy neither sought by respondents nor provided for by statute or by case precedent (Pet. App. 28-9).

Free off-the-air television is broadcast by at least 986 stations (another 1000-1500 low power stations are coming) for the purpose of furthering "the public interest, convenience, and necessity" (47 U.S.C. § 309(a)); the public receives it lawfully because it "is broadcast . . . for the use of the general public. . . ." (47 U.S.C. §§ 153(o), 605).

The home-use VTR (also called a videocassette recorder or "VCR") and the household TV receiver set are similar in that both receive free off-the-air television broadcasting. They are different in that the household TV set displays ("performs") the television program on its picture tube for viewing simultaneously with the reception; in contrast, the VTR receives the television program by recording it on tape for play-back through the TV set, and thereby for viewing, at a later time (Pet. App. 33, 39-41). This VTR "time shift" enables members of the public to view programs which they otherwise would miss — *e.g.*, workers on a "night shift" now can view "prime time" TV the next day (Pet. App. 82, 108). The VTR thus provides the "societal benefit" of

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[2]This is the first judicial decision in American legal history to hold a manufacturer, distributor, retailer or advertiser of a device strictly "liable for such use" as a contributory infringer when the consumer uses that device in the course of direct infringement. (The VTR retailers herein were not even alleged to be contributory infringers.)

furthering the "public interest, convenience, and necessity."

Regardless of whether home reception of free off-the-air television is with a TV set or with a VTR, the public has paid the programming owner indirectly, one way or another, for the right to view the program. Seven hundred twenty-seven (727) of the existing nine hundred eighty-six (986) stations are "commercial" stations, meaning that they obtain their revenue (and use it to pay for their programming, whether self-produced or licensed from others) from advertisers — who pay to have their commercials interspersed and broadcast with the programming. The remaining two hundred fifty-nine (259) stations are "public/educational" stations, which obtain their revenue from individual and governmental contributions (Pet. App. 50-54, 79-80).

There is a wide variety and massive amount of programming broadcast by these stations which is available for home recording, and is recorded, by VTR owners with the consent of the program owners.[3] Also, most local-originated TV

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[3] *E.g.*, entertainment programming (the *Spider Man* series), children's programming (*Mr. Rogers' Neighborhood*, the most widely viewed children's program in the nation, with three million families viewing daily), sports programming (Major League Baseball, National Football League, National Basketball Association, National Hockey League, National Collegiate Athletic Association), religious programming (National Religious Broadcasters, Faith Center), educational programming (the Bureau of Mass Communications of the New York State Education Department, the Center for Library Media and Telecommunications of the Board of Education of the City of New York, the New Jersey Public Broadcasting Authority, the Los Angeles City School Board of Education). Such available programming also includes motion pictures which are not copyrightable to start with (*e.g.*, 17 U.S.C. § 105) or on which copyright has expired (*e.g.*, *My Man Godfrey*). The NBC network, which owns TV programming, is itself owned by RCA — which sells its own brand of home VTR; NBC believes there is no reason why it and the VTR industry cannot grow and prosper alongside of each other. (Pet. App. 114; R.T. 1742-3, 1769, 2300-1, 2328-9, 2436-7; 2442-8, 2481-7, 2511-6, 2531-4, 2540-52, 2564-87, 2593-2606, 2615-6, 2623-40, 2823-44, 2863-2902, 2912-23, 2929-39, 3007-18; Def. Exh. OT, PD, PE, PF, PG, PH, PI, PK). Respondent Universal even agreed expressly to recent "guidelines" outlining still additional areas of available off-the-air programming — 127 Cong. Rec. No. 145, E 4751, October 14, 1981.

programming is recorded on tape prior to, or concurrently with, the broadcast—but the tape thereafter is erased and re-used without ever being registered for copyright; no protection exists against copying of such programs.[4] Since the home VTR thus is "used for purposes where no infringement could be alleged (*e.g.*, recording material which is not copyrighted or where permission to record is given)", the district court found the VTR to be a "staple item of commerce. Its uses are varied." (Pet. App. 92, 97, 104, 106-7, 114).

Respondents Universal City Studios, Inc. ("Universal") and Walt Disney Productions ("Disney"), collectively "U/D", license their programming to commercial stations, for broadcast at times chosen by the stations. U/D desire that each broadcast of their programming be viewed by the maximum possible number of viewers, because U/D believe that larger audiences mean larger license fees (Pet. App. 35-39, 50-54, 110). All of U/D's televised programming taken together constitutes less than 5% of commercial station broadcasting, and constitutes no part whatsoever of public/educational station broadcasting (R.T. 314-5, 532-3, 549-50). U/D are the only copyright owners ever to bring an infringement action against home recording (television or radio).

U/D did not seek to hold anyone liable for direct infringement by home recording.[5] U/D sought to hold Sony, Sonam and DDBI liable as contributory infringers based on nothing more than the manufacture, sale and advertisement of Betamax. U/D sought to hold the four VTR retailers

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[4]Def. Exh. OV; R.T. 1740-1. 17 U.S.C. §§ 301, 411(a).

[5]Defendant Griffiths was a Betamax owner, alleged to have infringed by home recording but granted immunity.

liable as direct infringers for demonstration recording in their stores.[6]

During a five week trial, U/D introduced evidence of 32 instances[7] of home recording of free off-the-air TV, by four Betamax owners.[8] U/D knew of no other home recording of their works (R.T. 392-5, 1212) and did not seek a finding of copyright infringement as to any other motion pictures (R.T. B 175). As to these four Betamax owners, Griffiths had recorded five Universal motion pictures; his practice is "to record, to watch and erase and reuse" his videotapes. Soule had recorded two Universal motion pictures and intended to erase them without viewing at all; normally he watches once and erases. Lowe or his son had recorded one Universal film, and six Disney cartoons for Lowe to watch with his son after work and then to erase. Wielage had recorded the rest, to watch alone or with a few friends, and then to erase (Pet. App. 33, 43-47).

No petitioner "in any way induced or caused to be made any of the copies at issue" (Pet. App. 93-4, 96-7, 98; R.T. 810-11, 866-70, 1567-70, 1576, 1578-9, 1582, 1586, 1593-4, 1616, 1651-3, 1675, 1680-1, 1686, 1696, 1939).

Each side also introduced into evidence a survey of home recording in general, based on 17,000 Betamax owners. Neither survey showed any recording of any U/D motion picture. They did show, in essence, that the bulk of Betamax usage (like the 32 instances in issue) is to record a program

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[6]Store demonstration recording is not an issue in this Petition inasmuch as both the district court and the Court of Appeals held it was not infringement (Pet. App. 29, 48-49, 87-9).

[7]Viz., 18 copyrighted motion pictures of Universal, 14 copyrighted motion pictures of Disney.

[8]Viz., defendant Griffiths, non-defendants Wielage, Lowe and Soule. All instances of recording were prior to the 1976 Act, except for Wielage's recording of one Universal and one Disney motion picture.

(including commercials), to playback once within a few days for viewing within the family, then to erase and to record something else — viz., "time-shift" (Pet. App. 47-8, 107).

U/D not only failed to offer any evidence of damage caused by home recording; they "admitted that no actual harm to their copyrights has occurred to date". They further failed to offer any evidence of any detrimental effect to be caused by home recording upon the potential market for, or value of, any of the motion pictures in issue; in fact, the evidence showed that home use recording "does not reduce the market for plaintiffs' works" (Pet. App. 50, 76, 87, 102, 107, 108, 115; R.T. 288-94, 394, 542-4, 1055, 1206-7, 1233, 1256-7, 1284-7 1340-1, 1376, 1387, 1493-4, 1763, 2241, 2251, 2269-70, 2281-9, 3260, 3268).

The district court's opinion held that none of the 32 instances of home recording in issue was a direct infringement (Pet. App. 34, 56-7, 65, 87, 115, 117) — and further held that there could have been no contributory infringement (Pet. App. 34, 89, 115, 117).

The Court of Appeals reversed the district court in all respects as to home recording, based on sweeping pronouncements of law — literally ignoring all the district court's findings of fact, yet not purporting to assert that even one of them was "clearly erroneous" (Rule 52(a), Fed. R. Civ. Proc.).

Within weeks after the Court of Appeals issued its opinion, Universal sued 42 other manufacturers, distributors and advertisers engaged in home VTR supply, including RCA, Zenith, Sears, Panasonic, Sanyo and Toshiba and representing essentially the entire balance of the home VTR industry — again, in the Central District of California (the "RCA *et al.* case" No. 81-5723 FW).

REASONS FOR GRANTING THE WRIT

1. This Court Has Not Settled, but Now Should Settle, the Question of Whether Reception at Home by Videotape Recorder (Followed Only by Private Viewing at Home) of Free Off-the-Air Television Programming Is an Infringement of Statutory Copyright on Such Programming.

A. The Importance of the Question.

Rarely has there been a copyright case of greater public, commercial, and academic[9] interest. The core question, the applicability of the 1909 Act and the 1976 Act to free off-the-air home videotape recording, in itself is an "important question of federal law which has not been, but should be, settled by this court". Moreover, the Court of Appeals' opinion raises three other related issues, each more general and perhaps equally important — viz., the limitation of "fair use" to "productive use", compulsory licensing as

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[9]Major law review articles on the Betamax case include: *Home Video Recording and the Copyright Act*, 6 Art & Law 19 (1980); *Videotape Recorders: Copyright Infringement?*, 33 Baylor L. Rev. 695 (1981); *Copyright Infringement in Video Recording*, 30 Catholic Univ. L. Rev. 621 (1981); *Home Use*, 3 Comm/Ent L. Journ. 53 (1979); *Betamax*, 1977 Duke L. Journ. 1181 (1977); *Audiovisual Recorders*, 58 Nebraska L. Rev. 467 (1979); *Fair Use Doctrine*, 15 New England L. Rev. 661 (1980); *Betamax*, 22 N.Y.U. Rev. Law & Social Change 497 (1978-79); *Betamax*, 18 PEAL 95 (1979); *Copyright Act of 1976: Video Recordation*, 42 Univ. of Pittsburgh L. Rev. 317 (1981); *Home Videotape Copying*, 1 Univ. of Puget Sound L. Rev. 192 (1977); *Home Videotape Recorders - Copyrights*, 13 Univ. Richmond L. Rev. 279 (1979); *Betamax*, 8 Rutgers Journ. of Computers, Technology and Law 85 (1980); *Betamax*, 21 Santa Clara L. Rev. 49 (1981); *Home Videorecording*, 52 So. Cal. L. Rev. 573 (1979); *The Betamax Case*, 31 Stan. L. Rev. 243 (1979); *The Betamax Case*, 10 Toledo L. Rev. 203 (1978); *Recording of Televised Copyrighted Works in the Home*, 55 Tulane L. Rev. 1295 (1981); *Fair Use*, 66 Virginia L. Rev. 1005 (1980); *The Betamax Case*, 37 Wash. and Lee L. Rev. 1277 (1980); *Home Video Recording*, 81 W. Va. L. Rev. 231 (1979); *Betamax and Copyright*, 1 Whittier L. Rev. 229 (1979). Most of these (but not all), upon varying grounds, advocate the district court's resolution of the case.

a remedy for copyright infringement, and contributory infringement of a product supplier based on strict liability. These are "questions whose resolution will have immediate importance far beyond the particular facts and the parties involved . . . ."[10]

The impact of the case is without parallel in any prior copyright case. The case has been famous since the day it was filed, and the decision of the Court of Appeals was featured prominently (and critically) in virtually every major national newspaper. The product in issue, the home VTR, now is used in over three million American homes by about twelve million citizens. For the first time since the advent of television, people can view the programs they need or want to view — not just the programs that happen to be broadcast at the time they are able to view. VTRs have been described as part of the "Most Promising Development" in television during the 1970's (*Time* magazine, January 7, 1980, p. 84).

American sales of VTRs and tape in 1982 (unless halted by the courts) will run over a billion dollars. American businesses are engaged in the manufacture of tape and raw materials therefor. Sonam's Alabama plant alone, which makes tape but not recorders, employs 1,800 people; these figures are dwarfed by the number of sales employees of such large American distributors of VTR's as Sonam, RCA, Zenith and Sears. Thousands more employees of large retail stores and electronics shops, such as the VTR retailer petitioners, and of national advertising agencies for VTR distributors, derive significant parts of their income from VTR sales. The decision of the Court of Appeals threatens a complete halt to all such activity. Such factors frequently

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[10]Address of Chief Justice Vinson before American Bar Association, September 7, 1949, 69 S.Ct. v, vi.

have motivated the exercise of this Court's jurisdiction in the past, and they should do so here.[11]

Whether the statute deems infringement the private, noncommercial recording in the home of material broadcast over the public airwaves is a question of as much import as those reviewed by this Court in its five copyright decisions of the last fifteen years. For instance, home video recording is as thorny a problem as the applicability of the copyright laws to community antenna television in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974). The immediate economic consequences and the number of persons affected are greater than in the prior cases involving photocopying, *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975), and amplification of radio broadcasts by small retail establishments for the enjoyment of their customers, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).[12]

"Fair use" has been developed in the lower federal courts since *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) but never has been examined by this Court, and copyright contributory infringement has not been examined by this

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[11]Besides the factor of important federal questions, immense amounts of money are involved as in *Commissioner v. Standard Life & Acc. Ins. Co.*, 433 U.S. 148, 151, n.5 (1977) ("substantially more than $100 million is in dispute"). Many individuals are potentially involved or affected by the decision below, as in *Patterson v. Lamb*, 329 U.S. 539 (1947) (status and claims of thousands of World War I draftees).

[12]The fifth case, *Goldstein v. California*, 412 U.S. 546, 555 (1973), involving a claim that federal copyright law preempted a California record piracy statute, is the fount of frequent argument that copyright is to provide "control over *sale* or *commercial use* of copies" and to "preclude others from copying . . . for *commercial* purposes" (emphasis added).

Court since 1911. The confusion in the lower federal courts over these central copyright issues now has reached new levels with the Court of Appeals' decision herein; only a review by this Court can return some order to the application of the copyright laws. Likewise, the scope of copyright remedies has been distorted by the Court of Appeals and is an important issue which can be put right only by this Court in this case.

B. This Court Should Settle the Question Now.

The Court of Appeals remanded the case to the district court to consider three affirmative defenses of petitioners[13] and to award relief (Pet. App. 30), but the defenses are factual and unique to petitioners, to respondents and to the 32 allegedly infringed works in issue. These defenses have nothing to do with the sweeping determinations of law by the Court of Appeals which now affect all TV program owners, all VTR and tape suppliers, and the public.

Review of the decision of the Court of Appeals on the issues of legislative intent, fair use, contributory infringement and scope of remedies should not await the remand ordered by the Court of Appeals. Any delay for a remand not only will leave unsettled the important federal questions presented by this case, but also will threaten the home recording practices of millions, and will leave open to imminent destruction the livelihoods of those involved in the home VTR business. The Court of Appeals directed the district court to "reconsider" granting respondents' request for "an injunction prohibiting the sale of Betamax". The Court of Appeals also said "statutory damages may be appropriate" (petitioners' continuing liability for $250-

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[13]Viz., laches and estoppel, copyright invalidity, and unclean hands/copyright unenforceability.

$50,000 statutory damages for every infringing recording would stop all VTR sales as effectively as an injunction) (Pet. App. 28, 102-3).[14] As said in one of the articles relied upon by the Court of Appeals to support its opinion, "In order to make a finding of infringement, a court must be willing to prevent the manufacture of a very popular technological advancement." (81 W. Va. L. Rev. 231, 250). The Court of Appeals obviously is willing.

In prior copyright cases, this Court has not waited for a district court decision on ancillary factual issues or on relief before clarifying fundamental questions of federal law. In *Williams & Wilkins Co., supra*, this Court reviewed the federal copyright law issue without awaiting a remand to determine copyright ownership; in *Fortnightly Corp., supra*, certiorari was granted on the issue of infringement prior to a remand to determine relief; in *Teleprompter Corp., supra*, certiorari was granted prior to a remand for further proceedings.[15]

Since the RCA *et al.* case was filed in a district court subject to the commands of the Ninth Circuit panel in the instant case, no correction of the fundamental errors in copyright law made by the Court of Appeals can be made in this new case.[16] Only this Court can resolve the status of home video recording before petitioners are threatened

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[14]The Court of Appeals added, "In fashioning relief, the district court should not be overly concerned with the prospective harm to appellees" and "the continued profitability of appellees' businesses is of secondary concern" (Pet. App. 29).

[15]Other recent examples of the grant of certiorari, prior to further district court proceedings made necessary by reversal, are *California Brewers Ass'n. v. Bryant*, 444 U.S. 598 (1980); *Butz v. Economou*, 438 U.S. 478 (1978); and *Time, Inc. v. Pape*, 401 U.S. 279 (1971).

[16]Universal already is telling the district court in the RCA *et al.* case that the Ninth Circuit has rendered "a judicial determination, binding on this [District] Court" with respect to "identical activities".

on remand and the rest of the home VTR industry is drawn into the swamp created by the Court of Appeals.

Although the Court of Appeals' decision prompted instant Congressional reaction (S. 1758; H.R. 4808), only this Court can settle the question of whether home video recording has been, now is, or will be (until and unless the 1976 Act is amended) infringement. No future amendment by Congress (if any there be) can resolve this question (*United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968)).

Although U/D to date have not sought to hold any VTR owner liable for home video recording, there is no assurance that other copyright owners will not do so if this Court does not settle the question promptly.

Although this case involves home *video* recording, opportunists in the record industry now are using the Court of Appeals' decision to assert that off-the-air home *audio* recording likewise is infringement — thereby reneging on assurances they made to Congress in 1971 to procure copyright protection for recording artists (Public Law 92-140, 85 Stat. 391).[17] This Court should settle the off-the-air

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[17] *E.g.*, in June 1971 Stanley M. Gortikov, president of the Record Industry Association of America, Inc., told Congress:

> "[T]he pirate also argues that granting a copyright may raise questions about the individual who in his home may duplicate a commercial performance on home-recording equipment. We in the industry certainly have known that such amateur practices go on in the home, and we realistically recognize that no such enforcement is possible, and certainly none is intended." (Hearings before Subcommittee No. 3 of the House Judiciary Comm., 92nd Cong., 1st Sess. on S. 646 and H.R. 6927, June 9-10, 1971, p. 26).

On December 15, 1981, the same Mr. Gortikov wrote in *The Washington Post*, "There is no 'legal immunity' for home audio taping in the current copyright law. There is no immunity for home audio taping in any of the statutory exemptions, or anywhere else in the 1976 act or its legislative history".

home *video* recording question before another conflagration erupts on the home *audio* recording question.

C. Home Videotape Recording of Free Off-the-Air TV Is Not Copyright Infringement.

Under the 1909 Act, the copyright owner was given the "exclusive right" to "copy" the copyrighted work (17 U.S.C. § 1(a)); under the 1976 Act, the copyright owner is given "exclusive rights" to "reproduce" the copyrighted work (17 U.S.C. § 106(1)).

However, copyright statutes do not have to give, and in practice do not give, a copyright owner control over all uses of the copyrighted work (*Fortnightly Corp., supra*, p. 393). Under the 1909 Act, the courts developed exceptions to the § 1 "exclusive right" under a doctrine of "fair use"; under the 1976 Act, exceptions or limitations as to the § 106 "exclusive rights" are codified, including "fair use" in general (§ 107) and various express usages in particular (§§ 108-118).

i. *Legislative History of the 1976 Act.*

The District Court examined legislative history of the 1976 Act at length. In contrast, the Court of Appeals said that the 1976 Act "is clear and unequivocal on its face" and hence that legislative history "is entirely beside the point" and "is not relevant" — and that resort to it "is entirely unnecessary" (Pet. App. 11-12). (Grossly inconsistently, the Court of Appeals acknowledged "recognition of an exemption for the home recording of sound recordings", an exemption which exists only by resort to the same legislative history (Pet. App. 9).)

The Court of Appeals thereby contravened numerous decisions of this Court which establish that the legislative record must be examined and Congressional intent honored. *Train v. Colorado Public Interest Research Group*, 426

U.S. 1, 9-10 (1976); *United States v. American Trucking Associations*, 310 U.S. 534, 544 (1940). In *Train* (p. 9), this Court held it error to exclude reference to legislative history, stating:

> "To the extent that the Court of Appeals excluded reference to the legislative history of the [Act] in discerning its meaning, the court was in error. As we have noted before: 'When aid to construction of the meaning of words is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination" '."

The Court of Appeals said that "our concern must be whether Congress has exhibited the intent to limit the rights of copyright owners in ways not specified in §§ 107-118." (Pet. App. 7). But even an abridged review of legislative history shows that Congress regarded and intended home recording, video and audio, to be fair use and thus precisely within the exceptions or limitations specified in § 107 — and therefore never made a particular express statutory exception as to either.

Revision of the 1909 Act into the 1976 Act commenced with the Legislative Appropriations Act of 1955; legislative history of the 1976 Act literally spans "the 20 year copyright revision process" (Pet. App. 11).

In 1961, the Register of Copyrights reported to Congress:

> "New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright."

In 1965, the Register of Copyrights further reported to Congress about "the imminent development of home video tape recordings."

The Report of the House of Representatives Committee on the Judiciary, pertaining to an interim 1971 Amendment to the 1909 Act, said:

> ". . . it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today. . . ."

Just a few days prior to passage of this 1971 Amendment, the following exchange took place on the House floor involving Rep. Kastenmeier (D. Wisc.), Chairman of the Subcommittee responsible for the 1971 Amendment:

> "Mr. Kazen (D. Tex.): In other words, if your child were to record off a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?
>
> "Mr. Kastenmeier: This is not included in the bill . . . this is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes. . . ."

117 Cong. Rec. 34749 (October 7, 1971).

The 1976 Act ultimately was passed in its entirety, with nothing contrary ever appearing in the legislative history on the subject of off-the-air home recording.

The point is not that "There was never a considered review of the home video recording problem" (Pet. App. 10-11); the point is that Congress' unequivocal attitude toward home recording, video and audio, was manifested clearly in legislative history during its review of other problems.

ii. *Fair Use.*

Certain uses of a copyrighted work traditionally have been allowed under the rubric "fair use" even though the use literally falls within the copyright owner's "exclusive rights" as defined by statute and even though the copyright owner has not consented to the use.

Since fair use "is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts" (1976 Sen. Comm. Rep.). The facts of this case showed only "time-shift" usage of U/D's works. As one commentator aptly said of the VTR, "Some uses infringe; others do not" (31 Stan. L. Rev. 243, 252 (1979)). Off-the-air recording with a VTR, followed by playback for commercial entertainment at a discotheque, obviously infringes (*American Broadcasting Companies, Inc. v. Le Disco Inc.*, Civ. 80-2724 (D. Mass. 1980)); on the other hand, "a court should . . . allow temporary taping for delayed viewing purposes [time shift] . . . . Temporary copying simply achieves the access the copyright owner wants viewers to have anyway. . . ." (31 Stan. L. Rev. 243, 263, 255 (1979)). Swapping tapes, duplicating tapes, recording off cable TV or pay TV, librarying, etc. present other differing and interesting legal questions, but they are not this case[18] — this case is only time-shift (Pet. App. 55-6).

Considering that the home video recording in issue is only a necessary and transitory step between free off-the-air TV broadcasts and some of the home viewing for which TV program owners have been paid and to which they have consented, such recording should be recognizable imme-

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[18]Such potential home VTR usages are not in issue and are irrelevant to this case (*Teleprompter, supra*, p. 405 n. 10).

diately as fair use (using nothing more than the "rule of reason" on which fair use was founded).

Section 107 provides that "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include" (1) the purpose and character of the use, (2) the nature of the work, (3) the amount and substantiality of the portion used vis-a-vis the whole, and (4) the effect of the use upon the potential market for or value of the work (Pet. App. 123). These factors are neither "definitive nor determinative" (1976 Sen. Comm. Rep.), viz., neither exclusive nor conclusive. The Senate and House Committee Reports on the 1976 Act recite identically that "There is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change", and "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way".

"Since the issue of fair use is one of fact . . . the clearly erroneous standard of review is appropriate." (*MCA v. Wilson*, 211 U.S.P.Q. 577 (2nd Cir. 1981)). The district court reviewed the specific home recording presented to it, made findings of fact using each of the statutory "factors", and made an ultimate finding that the home use recording in issue was fair use (Pet. App. 66-87).

The Court of Appeals did not "disturb" any of these factual findings as being "clearly erroneous" — it simply ignored them and substituted therefor contrary assumptions, and contrary statements from a treatise (see "Reason 5" hereinafter).

As to the "purpose" of home recording, the district court found it was "to increase access" of VTR owners at home to "material voluntarily broadcast to them free of charge

over public air waves", such as for those who had "to work" at broadcast time (Pet. App. 82, 108).

The Court of Appeals denigrated the purpose simply as "copying of entertainment works for convenience".[19] The Court of Appeals held that home video recordings of U/D's motion pictures are used for the same purpose as the motion pictures themselves — viz., for home viewing;[20] the court called this "intrinsic use" — as distinguished from "productive use" wherein copyrighted works are used by scholars, authors or the like in the course of producing new works (Pet. App. 14-15, 19).

The Court of Appeals reviewed *ad seriatim* the four factors of § 107 but, even before doing so, already had concluded from the "purpose" factor alone that "the fair use doctrine does not sanction home video recording. Without a 'productive use,' *i.e.*, when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use." (Pet. App. 18).

The Court of Appeals held, as to "purpose and character of the use", in the abstract and as a matter of law, that

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[19]The Court of Appeals failed to distinguish among the various possible "types" of purposes of Betamax use. First, of course, the *types of programs* copied may vary — types of programs whose owners do not, or cannot, oppose home recording are set forth in the Statement of Facts. Even as to U/D's programs, the fair use factors apply differently to different *types of uses*. Recording to watch one time and later erase ("time-shifting" — the kind of use in evidence) surely is less substantial and has a different economic effect than the hypothetical building of large tape libraries for repeated reviewing (there is no evidence of librarying as to U/D works). The Court of Appeals, however, swept all types of programming and all types of uses into its holding against fair use without examining the differences.

[20]In fact, the premise of the holding literally is erroneous. The "original" is used commercially to gain revenue by licensing; the "copies" are used non-commercially merely to consummate the private home viewing contemplated by such licensing.

"Since the copies made by home videorecording [U/D's motion pictures or anything else] are used for the same purpose as the original, a finding of fair use is not justified" (Pet. App. 23) — viz., no other fair use "factor" need be considered. This holding has public impact far beyond the home recording question — it poses a "certworthy" issue of its own. (See "Reason 2" hereinafter).

As to the "effect" of home recording on the potential market for or value of U/D's works, the district court found that home recording had caused "no harm to date" and "does not reduce the market for plaintiffs' works". (Statement of the Case, *supra*, p. 7).

The Court of Appeals ignored these findings and simply assumed "it seems clear that it tends to diminish the *potential* market for appellants' works." (Pet. App. 25). The Court of Appeals further said the district court "did not pay sufficient attention to the *cumulative* effect of mass reproduction of copyrighted works made possible by video recorders" (Pet. App. 24); in fact, there was no evidence of mass reproduction of any of U/D's works — 31 of the 32 works in issue had been recorded once, one had been recorded twice. Moreover, any theoretical "mass reproduction" necessarily would be limited to those members of the public to whom U/D's programs were broadcast; and any theoretical "cumulative effect" could be nothing more than a contribution to the home viewing intended when the program was broadcast.[21] "The privilege of receiving the

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[21]Congress has exempted from infringement cable systems which enhance viewing within the local geographical service area of the broadcast station, because there is no harm to the copyright owner (17 U.S.C. § 111; H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 90 (1976)); the same reasoning supports Congress' manifested intent that home VTR usage, which does only the same, was fair use.

broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so'' (*Teleprompter, supra,* p. 408).

As to ''nature of the copyrighted work'', the district court found that the ''most important aspect'' was that the case involves only works ''which plaintiffs voluntarily choose to have telecast over public air waves to individual homes free of charge'' (Pet. App. 79-80). U/D voluntarily exploit their works by commingling them with all the other programs on free off-the-air TV — programs whose subject matter ''nature'' runs the gamut, programs which have been ''released to the public'' (*Fortnightly, supra*, p. 400; *Teleprompter, supra*, p. 410), and 95+% of which programs has been available for unchallenged home reception by VTR. U/D have ''no control over the segment of the population which may view the program'' (*Teleprompter, supra*, p. 412); and they should have no control over ''how'' the population ''receive'' the program so as to view it. The overall relevant ''nature'' of U/D's works thus should be that U/D have consented to, or have assumed the risk of, home recording thereof. The Court of Appeals simply ''failed to see'' how the foregoing was ''relevant'' to fair use (Pet. App. 20-21).

As to the ''amount'' copied, the district court recognized that this factor ''is inextricably bound with the issue of harm'' (Pet. App. 82) — of which there was none. Overlooking the reason behind the rule, the Court of Appeals said the amount of copying ''clearly weighs against a finding of fair use.'' (Pet. App. 21).

2. The Decision Below Is in Conflict With Decisions of Other Courts of Appeal on the Question of Whether "Fair Use" of a Copyrighted Work (17 U.S.C. § 107) Is Limited to a "Productive Use", and Precluded From Being an "Intrinsic Use."

As set forth in "Reason 1, C, ii", *supra*, pp. 19-20, the Court of Appeals held that home recording of off-the-air TV was precluded, *per se*, from being fair use because it was "intrinsic use" — viz., use of the copy for the same purpose as the original. This arbitrary and stifling interpretation of fair use calls for immediate review by this Court before it is repeated and applied to improperly resolve other pending and future copyright cases.

The Court of Appeals recited that, except for two cases — *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975), and the district court opinion herein — fair use "has always had to do with the use by a second author of a first author's work." (Pet. App. 15).

The Court of Appeals expressly clashed head-on with the Court of Claims and the latter's decision in *Williams & Wilkins Co. v. United States*, *supra* (which found fair use where Xerox reproductions of medical journal articles were used for the same purpose as the original articles). The Court of Appeals called *Williams & Wilkins Co.* the "Dred Scott decision of copyright law", said it "is clearly not binding on this circuit", called "its underlying rationale singularly unpersuasive", and said that "the Court of Claims' approach — in treating intrinsic use of such work as within the bounds of fair use — created doctrinal confusion that raises the spectre of the evisceration of the traditional workings of the copyright scheme." (Pet. App. 15, 17).

The Court of Claims and the Court of Appeals are in square conflict on a highly important question of copyright law whose generality far transcends the question of home recording. The question is ripe for resolution by this Court.

3. The Decision Below Is in Conflict With Applicable Decisions of This Court on the Question of Whether the Manufacture, Sale and/or Advertisement of a Staple Item of Commerce (the VTR) Per Se Constitutes Contributory Infringement Whenever That Item Is Used for Direct Copyright Infringement.

The widespread importance and impact of this question is that, assuming *arguendo* that home recording of U/D's works is copyright infringement, holding VTR suppliers liable therefor as contributory infringers (for having done nothing more than to make VTRs available) effectively will deprive the public of VTRs for any purpose; on the other hand, if U/D had been limited to challenging the direct infringer, at least the public could continue to be supplied with VTRs and to receive the other 95+% of free off-the-air television.

This Court has made it clear that the suppliers of a staple item of commerce — viz., an item suitable for substantial non-infringing use — are not *per se* contributory infringers when an owner of the item uses it for direct patent infringement;[22] to hold otherwise "would block the wheels of commerce."[23] And the same principle has been applied by this Court to copyright infringement.[24]

The evidence showed, and the district court found, that "The videotape recorder, like a[n audio] tape recorder, is

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[22]*Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488-9 (1964). 35 U.S.C. § 271(c).

[23]*Henry v. A. B. Dick Co.*, 224 U.S. 1, 48 (1912); *overruled on other grounds* by *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917).

[24]*Kalem Co. v. Harper Brothers*, 222 U.S. 55, 62-3 (1911).

a staple item of commerce. Its uses are varied''; and that the VTR ''is also used for purposes where no infringement could be alleged (*e.g.*, recording material which is not copyrighted or where permission to record is given)'' (Statement of the Case, *supra*, pp. 4-5).

The Court of Appeals ignored the findings of fact. It said, in substitution therefor, ''Videotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming'' and ''Virtually all television programming is copyrighted material''[25]; and thereupon based its non-sequitur and erroneous conclusion that ''Therefore, videotape recorders are not 'suitable for substantial noninfringing use' '' (Pet. App. 25-26).

The Court of Appeals and the district court agreed that ''One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer'.'' (*Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). But the district court found that there was no evidence that ''defendants in any way induced or caused to be made any of the copies at issue''; the district court further noted that petitioners ''have neither the right nor the ability to control Betamax purchasers' use of the machine in their homes''. (Statement of the Case, *supra*, p. 6).

The Court of Appeals said, arbitrarily and with no pretense of evidentiary basis, that ''there is no doubt that ap-

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[25]This latter ''fact'' was based on a treatise reference. It is misleading in view of all the ''copyrighted material'' whose owners consent to home recording. It is erroneous, in principle, in light of the evidence of vast televised programming which is ''fixed'' on videotape when televised and hence ''copyrighted'' in a sense, but which thereafter is erased so as to make deposit, registration, and any infringement action, impossible. (17 U.S.C. § 411).

pellees have met the other requirements for contributory infringement — inducing, causing, or materially contributing to the infringing conduct of another. The corporate appellees are sufficiently engaged in the enterprise to be held accountable'' (Pet. App. 27).

The district court followed the aforesaid settled law of this Court and held that Sony, Sonam and DDBI could not be contributory infringers as to any of the home recording in issue. In contrast, the Court of Appeals defied the applicable decisions of this Court and held VTR manufacturers, distributors, retailers and advertisers to be liable *per se* as contributory infringers for all off-the-air home recording by VTR owners.

The only rationale ever articulated by commentators for holding VTR suppliers as contributory infringers is that it is easier for U/D to identify and sue a small number of VTR suppliers than to identify and sue a large number of VTR users (*e.g.*, 81 W. Va. L. Rev. 231, 247). However, neither legal precedent nor fairness to petitioners can justify making U/D's task easier by such a holding. The other side of this coin is that two non-consenting copyright owners thereby are being enabled to destroy all home VTR usage and the public benefit therefrom — *Aiken, supra*, p. 162, posed a similar ''highly inequitable'' potential circumstance as to radio and this Court refused to let it happen.

The findings of fact of the district court, coupled with the holding of the Court of Appeals, mean that the manufacture, sale and/or advertisement of a VTR, a staple item of commerce, *per se* constitutes contributory infringement whenever that VTR is used for off-the-air home recording. The conduct of the Court of Appeals in ignoring the findings of fact cannot mask the fact that it thus has decided a federal question of copyright contributory infringement in a way squarely in conflict with applicable decisions of this Court.

4. This Court Has Not Settled, but Now Should Settle, the Question of Whether a Federal Court Can Impose a Compulsory License on a Copyright Owner, and Impose Continuing Royalties on an Infringer, as a Remedy for Statutory Copyright Infringement.

Apparently sensing that either an injunction or the imposition of statutory damages would bring home video recording to a halt, the Court of Appeals lent its authority to an unsupported suggestion in a treatise and told the district court that "*a judicially created compulsory license*" with a "*reasonable*" and "continuing royalty . . . may very well be an acceptable resolution" (Pet. App. 28-29).

However, there is no statutory provision nor decisional precedent for compulsory licensing as a remedy for any copyright infringement. Respondents did not ask for such relief. The average copyright owner in the average copyright case probably does not want it and should not be subjected to it. This is another important and recurring "trouble" that has escaped from the Pandora's box created, and left open, by the Court of Appeals — and which this Court must settle promptly, before it sends the district court on a futile mission and also infects every other copyright infringement case now pending or hereafter filed.

5. The Court of Appeals Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

The district court's opinion constituted its "factual findings" (Pet. App. 35; Rule 52(a), Fed. R. Civ. Proc.). The Court of Appeal said this "elaborate, painstaking, and thoughtful opinion . . . carefully outlined the facts" (Pet. App. 3). Under the accepted and usual course of judicial proceedings, a court of appeals does not disturb a district

court's finding of fact unless it is "clearly erroneous", which means that "on the entire evidence" the court of appeals must be left with a definite and firm conviction that a mistake has been committed.[26]

The Court of Appeals did not "disturb" even *one* finding of fact by the district court (nor did U/D ask it to do so); the Court of Appeals simply ignored *all* these findings and substituted therefor contrary generalized statements based on assumptions or taken from a treatise. The opinion of the Court of Appeals does not mention, pro or con, a single finding of fact by the district court.

The Court of Appeals' reversal of the district court's holdings was founded upon, and depended upon, its substitution of assumptions of fact in lieu of the district court's findings of fact. With the uncontroverted evidence showing, and with the district court finding, that the home VTR was a staple item of commerce and that petitioners had not caused or induced any of the home recording in issue, there was no way the Court of Appeals could hold petitioners as contributory infringers if it adhered to the accepted and usual course of judicial proceedings.

The Court of Appeals' reversal as to fair use similarly was founded on repeatedly ignoring facts and substituting assumptions ("Reason 1, C, ii", *supra*).

In addition to having ignored findings of fact, the Court of Appeals held the four VTR retailers liable as contributory infringers for home recording direct infringement (Pet. App. 25, 30) — when there was not, and could not have been, any such allegation. The VTR retailers had been alleged only to be direct infringers and only because of store demonstration recording (Pet. App. 87). Three of the four re-

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[26] *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-5 (1948); *Thomas v. SS Santa Mercedes*, 572 F.2d 1331, 1335 (9th Cir. 1978).

tailers had not sold VTRs used for any home recording in issue (Pet. App. 94).

The district court recognized that it was "reviewing the limited claims of specified parties in a particular factual setting" and that it was "bound by the factual context of this litigation" (Pet. App. 34, 55-6, 81-82, 115). The district court made its findings of fact based on the evidence before it, and resolved the case or controversy about "time shift" presented to it.

In contrast, the Court of Appeals ignored the factual issues which made up the lawsuit, ignored the evidence and ignored the findings. Substituting contrary assumptions and contrary treatise references for the evidence and the findings, the Court of Appeals issued sweeping and generalized broadsides — holding all off-the-air home video recording (no matter the program, no matter the purpose) to be copyright infringement and holding everyone before it, alleged to be liable or not, to be a contributory infringer for all such recording. Only this Court can correct such gross deviation from the accepted and usual course of judicial proceedings — deviation that amounts to a denial of due process of law.

Conclusion.

For each and all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
DEAN C. DUNLAVEY,
(Counsel of Record),
DONALD E. SLOAN,
Attorneys for Petitioners,
Sony Corporation of America, et al.

Of Counsel:
MARSHALL RUTTER

March 11, 1982

Appendix

APPENDIX A.

Opinion of the United States Court of Appeals, Ninth Circuit.

Universal City Studios, Inc. a corporation, dba Universal Television and Universal Pictures, and Walt Disney Productions, a corporation, Appellants and Cross-Appellees, v. Sony Corporation of America, a corporation, The Sony Corporation, a corporation, Carter Hawley Hale Stores, Inc., a corporation, Associated Dry Goods Corporation, a corporation, Federated Department Stores, Inc., a corporation, Henry's Camera Corporation, a corporation, Doyle Dane Bernbach, Inc., a corporation, and William Griffiths, Appellees and Cross-Appellants. Nos. 79-3683, 79-3735 and 79-3762.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 6, 1981. Decided Oct. 19, 1981.

Owners of copyrighted audiovisual material brought infringement action against videotape recorder manufacturer, the distributor, sellers, and the advertising agency retained by the distributor. The United States District Court for the Central District of California, Warren J. Ferguson, J., 480 F.Supp. 429, entered judgment for the defendants, and appeal was taken. The Court of Appeals, Kilkenny, Circuit Judge, held that: (1) off-the-air copying telecasts of copyrighted audiovisual materials by owners of videotape recorders in their own homes for private noncommercial use constituted infringement and did not constitute fair use, (2) defendants were liable for contributory infringement in that they knew that the videotape recorders would be used to reproduce copyrighted materials and induced, caused, or materially contributed to the infringing conduct.

Reversed in part, affirmed in part, and remanded.

Stephen A. Kroft (on brief), Rosenfeld, Meyer & Susman, Beverly Hills, Cal., argued, for Universal Studios and Walt Disney.

Dean C. Dunlavey, Gibson, Dunn & Crutcher, Los Angeles, Cal., for Sony, Sony America, Doyle, Dane, Bernbach.

Appeal from the United States District Court Central District of California.

Before KILKENNY and CANBY, Circuit Judges, and EAST, District Judge.*

KILKENNY, Circuit Judge:

Appellants, Universal City Studios, Inc. (Universal) and Walt Disney Productions (Disney), producers and copyright owners of audiovisual materials, some of which they choose to telecast over the public airwaves, brought this copyright infringement claim against Sony Corporation (Sony), the manufacturer of the Betamax, a videotape recorder (VTR), and Betamax tapes, Sony Corporation of America (Sonam) (the American distributor of the Betamax), four retail establishments that sell the Betamax, Doyle Dane Bernbach, Inc. (DDBI) (the advertising agency retained by Sonam to promote the Betamax), and one individual (William Griffiths), who is an owner and user of the Betamax.

Appellants argue that home video recording of their copyrighted works constitutes copyright infringement and that the corporate defendants are liable as direct, contributory and/or vicarious infringers. Additionally, appellants contend that the retail defendants violated the copyright laws when they recorded portions of appellants' programs to demonstrate the Betamax to a prospective purchaser. Likewise, appellants presented additional claims arising under state law and sought broad injunctive relief, as well as profits and damages. The district court, after three years of liti-

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

gation and a five week nonjury trial, in the reported case of *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F.Supp. 429 (C.D.Cal.1979), entered judgment for appellees and held:

> (1) that copyright holders of audiovisual materials, some of which are sold for telecast over public airwaves, did not have monopoly power over off-the-air copying of those materials by owners of a videotape recorder in their homes for private, non-commercial use;
>
> (2) the retailer did not infringe upon the copyrights where it did not compete with nor profit from materials and intended only to demonstrate the recorder;
>
> (3) even if home-use copyrighting constituted an infringement, neither manufacturers, distributors, retailers, nor advertisers were liable under theories of direct or contributory infringement, or vicarious liability;
>
> (4) that even if the appellees were deemed liable, injunctive relief was not available where they did not unfairly compete with owners of copyrighted materials, nor interfere with their advantageous business relations.

FACTUAL BACKGROUND

The district court in its elaborate, painstaking, and thoughtful opinion, *Universal City Studios v. Sony Corp. of America, supra*, at 432, 442, carefully outlined the facts and the parties' contentions. In our view it would be a complete waste of judicial time and effort and of no benefit to the Bench or Bar to here repeat those facts and contentions.

ISSUES

I. Does off-the-air copying of copyrighted audiovisual materials by owners of a videotape recorder in their homes for private noncommercial use constitute an infringement?

II. Are the corporate appellees liable for infringement under any of the theories advanced?

III. If appellants are entitled to prevail, the nature of the relief to be granted.

IV. Retail store use of the copyrighted material.

V. Unfair competition claims under 15 U.S.C. § 1125(a) and state law.

I.

Our comments under this issue include:

(a) whether the district court committed error in finding an implied video recording exception in the applicable legislation, and

(b) whether home video recording constitutes fair use.

Article I, § 8, cl. 8 of the United States Constitution empowers the Congress: "To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." In commenting on this clause of the Constitution, our Supreme Court has said that "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' " *Mazer v. Stein*, 347 U.S. 201, 219, 74 S.Ct. 460, 471, 98 L.Ed. 630 (1954). Despite what is said in some of the authorities that the author's interest in securing an economic reward for his labors is "a secondary consideration," it is clear that the real purpose of the copyright scheme is to encourage works of the intellect, and that this purpose is to be achieved by reliance on the economic incentives granted to authors and inventors by the copyright scheme. This scheme relies on the author to promote the progress of science by permitting him to control the cost of and access to his novelty.

It is based on the premise that the exclusive right granted by the copyright laws "will not impose unacceptable costs to society in terms of limiting access to published works or pricing them too high." The district court relied heavily on its conclusion that the Copyright Act of 1976, providing that copyright holders have monopoly power over all productions of their works, did not include reproduction of sound recordings for home use. See 17 U.S.C. §§ 106(1), (4), (5) and 107. In arriving at this conclusion, the court compared the Copyright Act of 1909, which created the fair-use doctrine to immunize some forms of copying from the literal implications of the Act. 17 U.S.C. (1970 Ed.) § 1 with the language of 17 U.S.C. § 106 of the New Act which provides:

> "Subject to sections 107 through 118, the *owner of copyright under this title has the exclusive rights to do and to authorize any of the following:*
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture of other audiovisual work, to display the copyrighted work publicly." [Emphasis added.]

"The approach of the [statute] is to set forth the copyright owner's exclusive rights in broad terms in section 106, and

then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made 'subject to sections 107 through 118,' and must be read in conjunction with those provisions." H.R. No. 94-1476, p. 61 Sept. 3, 1976, reprinted 1976 U.S.Code Cong. & Admin.News, 5659 at 5674, 94th Congress, 2d Sess.

The statutory framework is unambiguous; the grant of exclusive rights is only limited by the statutory exceptions. Elementary principles of statutory construction would indicate that the judiciary should not disturb this carefully constructed statutory scheme in the absence of compelling reasons to do so. That is, we should not, absent a clear direction from Congress, disrupt this framework by carving out exceptions to the broad grant of rights apart from those in the statute itself. It is the duty of the courts to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question. *Southeastern Cominunity College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979); *Chapman v. Houston Welfare Rights Organization*. 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979); *United States v. Bornstein*, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976); *Commissioner v. Bilder*, 369 U.S. 499, 82 S.Ct. 881, 8 L.Ed.2d 65 (1962); *Church of Scientology of California v. U.S. Dept. of Justice*, 612 F.2d 417 (C.A.9 1979).

Our study of the record and analysis of the legislation convinces us that the district court inadvertently bypassed the statutory framework of the 1976 legislation and, in particular, § 106 of the new Act. In commenting on the "broad language" of the new Act, the district court expressed the belief that despite the monopoly power over all reproductions of their works granted by § 106, nonetheless, the

legislative history indicated to the contrary: We quote from its opinion:

> "The broad language of the New Act suggests that copyright holders have monopoly power over all reproductions of their works. Legislative history, however, shows that Congress did not intend this broad statement to include reproductions of sound recordings for home use. The central question here is whether Congress intended the same language to give copyright holders of audiovisual works monopoly power over off-the-air recording of their works for home use. Legislative history does not show this intent." 480 F.Supp. at 443.

By characterizing its task as a search for whether Congress intended to afford protection, the district court misapprehended the scope of the relevant inquiry. The issue is not whether Congress exhibited an intent to protect a copyright holder from certain reproduction of his works. It had already expressed its intent to do so by extending the "bundle of rights" set forth in § 106 to copyright owners, *subject to specific sections*, to-wit: §§ 107-118. Consequently, our concern must be whether Congress has exhibited the intent to limit the rights of copyright owners in ways not specified in §§ 107-118. When one analyzes whether there exists an implied home video recording exception, apart from the fair use doctrine, in the light of the statutory framework, it is manifest that the district court's conclusion was erroneous. While the sound recording situation is analogous, there are a number of reasons why sound recordings should receive different judicial treatment.[1] The difference between these

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[1]The district court's reasoning has been subject to a number of criticisms. Note, *Universal City Studios, Inc. v. Sony Corp.*: 'Fair Use' Looks Different on Videotape. 66 Va.L.Rev. 1005, 1011-12 (1980). Note, the *Betamax* Case: Accommodating Public Access and Economic Incentive in Copyright Law, 31 Stan.L.Rev. 243, 247 n. 18 (1979); 8 N.Y.U.Rev.L. & Soc. Change, 45, 48-51, 1978-79; Note, Copyright—The Home Video Recording Controversy, 81 W.Va.L.Rev. 231, 245-247 (1979).

two approaches—did Congress intend to afford protection or did Congress intend to withdraw protection—is more than a matter of semantics.[2]

First, the copyright statute treats sound recording and audiovisual works as separate categories of protected materials.[3] And Congress has shown "special solicitude for audiovisual works."[4] For example, audiovisual materials are specifically excluded from some exemptions by the 1976 Act. 17 U.S.C. §§ 108(h), 110(1), 112(a). Section 108 provides strong support for the conclusion that Congress was concerned about unauthorized reproduction of audiovisual works, whether or not such reproductions were for profit. Section 108(h) excludes audiovisual works other than an audiovisual work dealing with the news from the limited exception provided by § 108. The House Report dealing with § 108(h) indicates that the doctrine of fair use may have a limited application to the reproduction of such works. House Report at 1976 U.S.Code. Cong. & Admin.News at 5692. In addition, even as to audiovisual news programs,

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[2]Most of the commentators have found problems with the reasoning underlying the district court's conclusion. 3 *Nimmer on Copyright*, § 13.05[F][5] at 13-95-96, n. 159 (1981); *Universal City Studios, Inc. v. Sony Corp.*: 'Fair Use' Looks Different on Videotape, 66 Va.L.Rev. 1005, 1011-12 (1980); Note, The *Betamax* Case: Accommodating Public Access and Economic Incentive in Copyright Law, 31 Stan.L.Rev. 243, 247, n. 18 (1979); 8 N.Y.U.Rev.L. & Soc. Change 45, 48-51 (1978-79); Note, Copyright—The Home Video Recording Controversy, 81 W.Va.L.Rev. 231, 245-47 (1979); Marsh, *Betamax and Fair Use: A Shotgun Marriage*, 21 Santa Clara L.Rev. 49, 61-67 (1981).

[3]17 U.S.C. § 102 lists seven illustrative categories of "works of authorship" which are copyrightable. Section 102(a)(6) is "motion pictures and other audiovisual works" and § 102(a)(7) is "sound recordings."

[4]This reflects, no doubt, the relatively large economic investment involved in the creation of audiovisual works and the especial danger posed by unauthorized reproductions. See Marsh, *Betamax and Fair Use: A Shotgun Marriage*, 21 Santa Clara L.Rev. 49, 64-66 (1981).

which are subject to the § 108 exemption, the H.R. notes, in regard to § 108(f)(3), that:

> "It is intended to permit libraries and archives, subject to the general conditions of this section, to make off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes. As such, it is an adjunct to the American Television and Radio Archive established in Section 113 of the Act which will be the principal repository for television broadcast material, including news broadcasts. The inclusion of language indicating that such material may only be distributed by lending by the library or archive is intended to preclude performance, copying, or sale, whether or not for profit, by the recipient of a copy of a television broadcast taped off-the-air pursuant to this clause." 1976 U.S. Code Cong. & Admin.News at 5690-91.

In light of this caution with respect to the limited § 108 exception, it is clear that Congress did not intend to create a blanket exemption for home video recording, even when the recording is not for a commercial purpose.

Second, much of the underlying rationale for the recognition of an exemption for the home recording of sound recordings is simply not applicable to videorecording. Congress, when it granted limited copyright protection to sound recordings for the first time in 1971, made it clear in the legislative history that:

> "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use

> and with no purpose of reproducing or otherwise capitalizing commercially on it. *This practice is common and unrestrained today*, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." [Emphasis added.] U.S.Code Cong. & Admin.News 1971, 1566 at 1572.[5]

Beyond question that statement was not intended to apply equally to home videorecording.[6] Perhaps most importantly,

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[5]This language was not repeated in the legislative history accompanying the 1976 Act. The district court did not find this significant. Nimmer has commented that:

> "This conclusion seems questionable on several grounds. First, the failure to repeat in the Committee Reports for the current Act an intention to recognize the home recording exemption referred to in the House Report for the 1971 Amendment is at least as consistent with an altered intention upon the part of the Congress enacting the Act of 1976. This is particularly true in view of the fact that other passages from the House Report for the 1971 Amendment were incorporated verbatim in the House Report for the current Act. . . . There is further the fact that the Amendment of 1971 was itself legislation limited to the creation of copyright in sound recordings, and did not (in this context) purport to affect the copyright in musical or other works which may be contained in such sound recordings. Therefore, the home recording exemption referred to in the House Report for the 1971 Amendment could only be applicable to the sound recording copyright, not to the copyright in any underlying work contained therein. . . . Finally, it is to be noted that the House Report for the current Act states that 'it is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use.' H.Rep., p. 66" 3 Nimmer, *supra*, § 13.05[F][5] at 13-96, n. 159.

[6]The House Report to the 1971 Sound Recording Act carefully excluded sounds accompanying motion pictures from the scope of that particular piece of legislation.

> "In excluding the 'sounds accompanying a motion picture' from the scope of this legislation the Committee does not intend to limit or otherwise alter the rights that exist currently in such works. The exclusion reflects the Committee's opinion that soundtracks or audio tracks are an integral part of the 'motion pictures' already accorded protection under subsections (*l*) and (m) of Section 1 of title 17, and that the reproduction of the sound accompanying a copyrighted motion picture is an infringement of copyright in the motion picture. . . ." 1971 U.S.Code Cong. & Admin.News at 1570-71.

Congress simply was not addressing the problem of home video recording. Certainly in 1971, home video recording did not present Congress with a "common and unrestrained practice" developed in a period when copyright protection was wholly lacking.[7]

There is no clear legislative language indicating that home video recording is not within the exclusive rights granted by § 106. The statute itself and the House and Senate Reports accompanying the 1976 Act do not provide for a broad based home use exception. There was never a considered review of the home video recording problem. The statements supporting the district court's conclusion[8] hardly represent—when considered in the content in which they were made and in the context of the 20 year copyright revision process—a firm expression of Congressional intent to carve out a major exception to the copyright scheme.

. The legislative history of the 1971 Amendment, heavily relied upon by the district court as disclosed by its opinion, 480 F.Supp. pages 444 and 445, is entirely beside the point. It is clear that the history relied upon, H.R. No. 487, 92d Cong., 1st Sess. 7, Reprinted [1971] U.S. Code Cong. & Admin.News, pages 1566, 1572, was not intended to apply equally to video home recording. We have emphasized this point in our footnote 6. Above all, it must be recognized that the Congress was in no way addressing the problem of video recording in its discussion of the 1971 legislation. Consequently, the analogy the district court attempted to

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[7]Motion pictures had been protected by the copyright laws since 1912.

[8]See 480 F.Supp. at 445-46. The statements of Barbara Ringer and Representative Kastenmeier were made extemporaneously at a committee hearing and on the House floor respectively, and they were in connection with the Sound Recording Act of 1971. The statements do not represent a considered review of the home videorecording problem, and even these statements do not clearly establish an intent to exempt unauthorized reproductions *apart from the fair use doctrine*.

draw between that legislation and the Act of 1976 is simply without foundation. There is absolutely nothing in the 1971 legislation which would indicate that the Congress was in any way concerning itself with home video recording. It is well settled that silence cannot be viewed as an expression of Congressional intent. *Turpin v. Mailet*, 579 F.2d 152 (C.A.2 1978), vacated, 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 645, 591 F.2d 426 (C.A.2 1979). Beyond that, where the meaning of a statute is clear and unambiguous, it would be highly improper to construe inconclusive legislative history so as to apply a statute in a manner inconsistent with its claimed meaning. *United States v. Wilson*, 591 F.2d 546 (C.A.9 1979).

Resort to the legislative history of an Act is entirely unnecessary when the statute is clear and unequivocal on its face. *United States v. Oregon*, 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961), rehearing denied 368 U.S. 870, 82 S.Ct. 24, 7 L.Ed.2d 70. The legislative history of a statute is not relevant when the terms of the statute are clear and unambiguous. *Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*, 507 F.2d 905 (C.A.9 1974).

[1] On this issue, we conclude that off-the-air copying of copyrighted audiovisual materials by owners of videotape recorders in their own homes for private noncommercial use, constitutes an infringement of appellants' copyrighted audiovisual materials.

FAIR USE DOCTRINE

As indicated by the district court, the analysis of whether the recording was infringement does not end with the statutory language. While the old Act was in effect, the courts pronounced a rule of law known as the doctrine of "Fair Use." This doctrine has been appropriately described as

"the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (C.A.2 1939). From its inception, the doctrine has presented members of the judiciary with among the most elusive views that the courts are called upon to decide. It has been said that the doctrine is entirely equitable and is so flexible as virtually to defy definition. *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130 (S.D.N.Y.1968). Time after time the courts have ruled on the Fair Use doctrine, but no real definition of the concept has ever emerged. One of the better definitions is that of the Second Circuit in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (C.A.2 1966), *cert. denied*, 385 U.S. 1009, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967), where it is said that fair use is "a privilege in others than the owners of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner" by the copyright. The Congress in the legislation of 1976 attempted to define fair use in § 107 which reads:

> "Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factor to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

> (4) the effect of the use upon the potential market for or value of the copyrighted work."

It is noteworthy that the legislative history of § 107 makes it clear that its statements of the fair use doctrine offer some guidance to users in determining when the principles of the doctrine apply. However, it is there emphasized that the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules.

The history states that the legislation endorses the purposes and general scope of the *judicial doctrine* of fair use, but there is no disposition to freeze the doctrine in the statute. We quote from the closing sentence of the history:

> "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way" U.S.Code Cong. & Admin.News 1976, 5680.

Consequently, and despite what is said by the district court, this fair use analysis is equally applicable to alleged violations under both the Old and the New Act. It is interesting to note that appellees have not suggested that home video recording would not violate the Old Act in the absence of a finding of fair use.

Despite the nebulous character of the doctrine, previous case law and the general copyright scheme do provide us with considerable guidance. As the first sentence of § 107 indicates, fair use has traditionally involved what might be termed the "productive use" of copyrighted material. See 66 Va.L.Rev. at 1012-1014. The purposes listed in § 107 are simply illustrative and not limitative, but they do give some idea of the general orientation of the doctrine. It is noteworthy that the statute does not list "convenience" or "entertainment" or "increased access" as purposes within the general scope of fair use.

Leon Seltzer, in his illuminating book *Exemptions and Fair Use in Copyright* (1978) states:

> "The list, causal or studied as it may be, reflects what in fact the subject matter of fair use has in the history of its adjudication consisted in: *it has always had to do with the use by a second author of a first author's work*. Fair use has not heretofore had to do with the mere reproduction of a work in order to use it for its intrinsic purpose—to make what might be called the 'ordinary' use of it. When copies are made for the work's 'ordinary' purposes, ordinary *infringement* has customarily been triggered, not notions of fair use." *Id.* at 24. [Emphasis in original.]

The cases have, for the most part, adhered to this aspect of the fair use doctrine. If an alleged infringer has reproduced a copyrighted work to use it for its intrinsic purpose, fair use has not generally been applied. Nimmer notes, however, that the courts have not adhered to this notion in recent years, and cites two cases as authority—*Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct.Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376, 95 S.Ct. 1344, 43 L.Ed.2d 264 (1975), and the district court's opinion in this case. *Nimmer, supra*, § 13.05[A][1] at 13-58 n. 23.3. *Williams & Wilkins Co.*, which has been appropriately regarded as the "Dred Scott decision of copyright law," 487 F.2d at 1387 (Nichols, J., dissenting), is clearly not binding in this circuit, and, in any event, we find its underlying rationale singularly unpersuasive. The district court, while noting that *Williams & Wilkins Co.* "has little precedential value," 480 F.Supp. at 450, and quoting Nimmer's critique of the opinion, *Id.* at 451, used *Williams & Wilkins Co.'s distortions of the fair use rationale to justify an application of the doctrine which, in our opinion, stretches fair use beyond recognition and undermines*

our traditional reliance on the economic incentives provided to authors by the copyright scheme.

In Williams & Wilkins Co., the Court of Claims found that copying by the National Institute of Health (NIH) and the National Library of Medicine (NLM) of entire articles published in plaintiff's journals was fair use. Plaintiff was the publisher of certain medical and scientific journals. The libraries regularly filled requests for journal articles (including some in plaintiff's journals) by photocopying such articles. Under this system, the libraries copied approximately 200,000 articles a year. The majority identified the core of its fair use finding:

> "First, plaintiff has not in our view shown, and there is inadequate reason to believe, that it is being or will be harmed substantially by these specific practices of NIH and NLM; second, we are convinced that medicine and medical research will be injured by holding these particular practices to be an infringement; and, third, since the problem of accommodating the interests of science with those of the publishers (and authors) calls fundamentally for legislative solution or guidance, which has not yet been given, we should not, during the period before congressional action is forthcoming, place such a risk of harm upon science and medicine." 487 F.2d at 1354.

We believe that *Williams & Wilkins Co.* is clearly distinguishable. It appears that the Court of Claims was primarily concerned about the serious damage to medical science that would result if it held for the plaintiff. In this case, there is no corresponding countervailing societal benefit to "weigh" against the copyright interests of the author. We do not mean to suggest that increased access to such Disney products as "Chip and Dale/Mixed Nuts" is not a benefit to society. We only mean to say that the conse-

quences attendant upon reduced consumer control of access do not in any way correspond to the deleterious consequences of reduced access identified by the Court of Claims in *Williams & Wilkins Co.*

Aside from the obvious distinctions between *Williams & Wilkins Co.* and the instant case, we believe that the Court of Claims' approach—in treating intrinsic use of such work as within the bounds of fair use—created doctrinal confusion that raises the spectre of the evisceration of the traditional workings of the copyright scheme. As Seltzer has stated:

> "The traditional fair use notion has had to do with the sort of access that the mind of a user has to a copyrighted work: the work is instantly accessible on sight or hearing, and the question is what the second user would or should be allowed to 'do' with it—or, more accurately, what the creator of the work ought to have expected him freely to do with it. Use for photocopying and phonorecording involves a different sort of access: the possibility—and the capability—of instant reproduction of the work in the same mode and for the same purpose the original was in the first place acquired. With the first sort of access and use we can deal under notions of fair use, even when it involves photocopying, for appropriate expectations of economic reward are essentially unchanged. *The second kind of access and use triggers questions of reallocation of costs, however, and insofar as a use is of that sort, it is appropriately dealt with as an exemption from the normal workings of the copyright scheme, ...*" Seltzer, *supra*, at 37-38. [Emphasis added.]

Seltzer concludes that exemptions from the normal workings of the copyright scheme, because they involve the reallocation of costs, are matters for Congress, not the courts.

We hold that, particularly in the context of new technology, there is a danger to including the sort of copying

involved in *Williams & Wilkins Co.* within the scope of the fair use doctrine. New technology, which makes possible the mass reproduction of copyrighted material (effectively taking control of access from the author), places a strain upon the fair use doctrine. A court, if it decides that fair use is applicable, is required to weigh—in "balancing the equities"—the "benefit" of an extremely popular increase in access with the "harm" to a plaintiff. The harm to a copyright plaintiff is inherently speculative, and as *Williams & Wilkins Co.* and the district court decision indicate, a plaintiff is faced with the unenviable task of proving the nonexistence of fair use, which has typically been viewed as a *defense*.

The costs are also important. They fall primarily into two categories. First, the result of applying fair use to intrinsic use cases like *Williams & Wilkins Co.* and this case is a fundamental restructuring of the copyright system not justified by the statutory scheme or traditional notions of fair use. Second, the framework for copyright litigation this view establishes is ultimately hostile and extremely adverse to the rights of copyright holders. It places them in the unenviable position of proving damage in a context in which extreme difficulty is acknowledged.

As a society, we may decide that these costs are acceptable. But, that branch of public policy determination is preeminently a decision for the legislative branch.

[2] It is our conviction that the fair use doctrine does not sanction home videorecording. Without a "productive use", *i.e.* when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use. An analysis of the four factors listed in § 107 does not dictate a contrary result.

A consideration of the first factor—"the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"—does not aid appellees' case. The district court noted that "Courts have traditionally applied this factor by asking whether the copyrighted material is used for criticism, research or other independent work." 480 F.Supp. at 453. The fact that the use involved does not further a traditionally accepted purpose clearly weighs against a finding of fair use. The district court, however, emphasized the noncommercial[9] and home use of the copyrighted material. The statute does not, however, draw a simple commercial/noncommercial distinction. The statute contrasts commercial and nonprofit educational purposes, and there is no question that the copying of entertainment works for convenience does not fall within the latter category. The fact that the "infringing" activity takes places in the homes does not warrant a blanket exemption from any *liability*. It seems more appropriate to address the privacy concerns raised by the district court in fashioning the appropriate relief. The suggestion that First Amendment concerns support the purpose of Betamax users to increase the access to copyrighted materials is wholly without merit. "The first amendment is not a license to trammel on legally recognized rights in intellectual property." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (C.A.5 1979); *Walt Disney Productions v. Air Pirates*, 581 F.2d

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[9] "[C]ommercial use tends to cut against a fair use defense." *Triangle Publications, Inc. v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1175 (C.A.5 1980) (footnote omitted). Noncommercial motive does not mean fair use. 66 Va.L.Rev. at 1017; Marsh, *supra*, at 68-71. The "noncommercial" characterization of home videorecording is a bit misleading. The corporate defendants involved in the lawsuit are obviously not in the business of promoting home videorecording for strictly altruistic reasons.

751, 759 (C.A.9 1978), *cert. denied*, 439 U.S. 1132, 99 S.Ct. 1054, 59 L.Ed.2d 94 (1979); *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1160-1171 (C.A.9 1977).

The second factor—"the nature of the copyrighted work"—does not support a finding of fair use. The legislative history and the case law dealing with this factor are rather sparse, but there seems to be some indication that the scope of fair use is greater when informational type works, as opposed to more creative products, are involved. Seltzer, *supra*, at 33-34; Nimmer, *supra*, § 13.05[A][2] at 13-61. The courts inquire whether the nature of the material is such that additional access "would serve the public interest in the free dissemination of information." *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 307; *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130, 146 (S.D.N.Y.1968). If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted.[10] The district court, however, found it significant that "This case involves only that copyrighted material which plaintiffs voluntarily choose to have telecast over public airwaves to individual homes free of charge." 480 F.Supp. at 453. We fail to see how the method by which appellants have chosen to distribute their works is

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[10]*Rohauer. v. Killiam Shows, Inc.*, 379 F.Supp. 723, 733 (S.D.N.Y. 1974), *rev'd on other grounds*, 551 F.2d 484 (C.A.2 1977), *cert. denied*, 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 ("There is no discernible public interest in the dissemination of 'The Son of the Sheik' sufficient to justify the infringement. . . . It can scarcely be argued here that the enduring fame of Rudolph Valentino or the intrinsic literary and historical merit of 'The Son of the Shiek' (whatever it may be) serves any public interest sufficient to endow these defendants with the privilege of fair use."); *Loew's Inc. v. Columbia Broadcasting System*, 131 F.Supp. 165, 175 (S.D.Cal.1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (C.A.9 1956), *aff'd. by an equally divided court*, 356 U.S. 43, 78 S.Ct. 667, 2 L.Ed.2d 583 (1958).

relevant to this factor of the fair use analysis. We are in substantial agreement with one commentator's discussion of the district court's analysis on this issue:

> "While this attribute of the broadcast industry complicates the economic harm analysis, it has no bearing on society's interest in the dissemination of the material or the author's reasonable expectation of compensation for repeated use of his material. These issues, basic to the rationale of the fair use doctrine, implicate the intrinsic qualities of the work, not the medium of its presentation. The *Sony* court's analysis obfuscated the real issue at stake; whether the public interest in promoting the development of art and science dictates disregarding a copyright holder's interest in controlling the use of his product. In *Sony*, the copyright owner's interest should have taken precedence." 66 Va.L.Rev. at 1020-21.

The third factor—"the amount and substantiality of the portions used in relation to the copyright work as a whole"—clearly weighs against a finding of fair use. The district court acknowledged that "Home use recording off-the-air usually involves copying the entire work," 480 F.Supp. at 454, and that this typically precludes a finding of fair use. The court concluded, however, that the courts have *only* been concerned about the "substantiality" of the copying when it produced harm, and that "this taking of the whole still constitutes fair use, because there is no accompanying reduction in the market for 'plaintiff's original work.' " *Id.* We believe that this view of the case law is completely wrong.

In *Walt Disney Productions. v. Air Pirates, supra,* we stated "While other factors in the fair use calculus may not be sufficient by themselves to preclude the fair use defense, this and other courts have accepted the traditional American

rule that excessive copying precludes fair use." *Id.* at 758. In addition, the district court in *Loew's Inc. v. Columbia Broadcasting System*, 131 F.Supp. 165 (S.D.Cal.1955), stated "The mere absence of competition or injurious effect upon the copyrighted work will not make a use fair. The right of a copyright proprietor to exclude others is absolute and if it has been violated the fact that the infringement will not affect the sale or exploitation of the work or pecuniarily damage him is immaterial." *Id.* at 184. A panel of this court later affirmed *Benny v. Loew's, Inc.*, 239 F.2d 532 (C.A.9 1956), and specifically noted that "The judgment is affirmed upon the findings of fact and conclusions of law of the district court and for the reasons set forth in the opinion of [the district judge]." *Id.* at 537. These cases clearly did not limit their discussion of "substantiality" to cases in which the plaintiff had been harmed. It seems clear that these cases are based, in part, on the notion that copyright is a property interest and that it is impermissible, in the vast majority of cases, to "appropriate" the copyrighted material without the owner's consent. The copyright laws afford the author the right to control access to his work, and, absent compelling justifications, this right should not be abridged.

We need not rest our holding on the applicability of the "substantiality" discussion in *Air Pirates* and *Loew's* to the home videorecording context, but it seems clear that this factor in the fair use calculus weighs heavily in appellants' favor.

The fourth factor—"the effect of the use upon the potential market for or value of the copyrighted work"—does not support a contrary result. In light of the preceding discussion, we do not believe that it is necessary to address the harm issue with respect to the liability question. We feel

compelled, however, to express our disagreement with the district court's approach on this issue.

First, it seems apparent that the district court was much too strict in requiring appellants to establish its degree of harm.[11] Our sentiments are the same as those of one of the dissenters in *Williams & Wilkins Co.* who stated, "Although the court states that it rejects the trial determinations as to both actual and potential damage to plaintiff, I think the opinion shows that the court's conclusion is based primarily on its finding that *plaintiff failed to prove actual damages.*" 487 F.2d at 1367 (Cowen, C. J., dissenting). [Emphasis added.] That is simply too great a burden to impose on copyright plaintiffs. Nimmer has suggested that "the central question in the determination of fair use is whether the infringing work *tends* to diminish or prejudice the potential sale of plaintiff's work." 3 Nimmer, *supra*, § 13.05[E][4][c] at 13-84. [Emphasis added] [Footnote omitted.][12] Under this sort of standard, it seems clear that appellants should have prevailed. Since the copies made by home videorecording are used for the same purpose as the original, a finding of fair use is not justified.[13] The district court seems to recognize, on several occasions, that appellants will have to

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[11]The courts typically state that irreparable harm is presumed. *Encyclopaedia Britannica Educational Corp. v. Crooks*, 447 F.Supp. 243, 247, 251 (W.D.N.Y.1978). The presumption noted in *Crooks* was not because of the procedural posture (motion for preliminary injunction). The court noted that, at trial, the defendant would have an opportunity to rebut the presumption. In our case, it is clear that appellees did not establish with any degree of certainty that such harm was not likely to occur.

[12]The Second Circuit has used this approach. *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (C.A.2 1977).

[13]Put another way, because the copies serve the same function as the original, the "functional test" suggests that fair use is not available. 3 Nimmer, *supra*, § 13.05[B]; *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F.Supp. 351 (N.D.Ga. 1979).

take affirmative steps to compete with the appropriated versions of their work. That such competition is necessary supports appellants' allegations of harm; at the least, it makes clear that the "infringing" activity *tends* to prejudice the potential sale of appellants' work. It is clear that home users assign economic value to their ability to have control over access to copyrighted works. The copyright laws would seem to require that the copyright owner be given the opportunity to exploit this market.

Second, we do not believe that the district court paid sufficient attention to the fact that it is extremely difficult for a copyright plaintiff to prove harm from the activities of specific defendants. 3 Nimmer, supra, §13.05[E][4][c]. As Nimmer states, "Far from this justifying a defense of fair use, failure to prove damages will in the usual case give rise to a minimum statutory damages liability. It is only when the general dissemination of an allegedly infringing work by all potential defendants, and without limitation as to the number of reproductions, and volume of users would still not adversely affect the plaintiff's potential market that a conclusion of fair use may be justified." *Id.* at 13-84.[14] The district court quoted, in what seemed to be an approving manner, similar sentiments from one of Nimmer's law review articles, but the court clearly did not use this rationale in deciding the fair use question. The court, in analyzing the fourth fair use factor, did not pay sufficient attention to the *cumulative* effect of mass reproduction of copyrighted works made possible by videorecorders. It seems clear that absent an inquiry which takes into consideration the full

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[14]Senate Report 94-473 seems to express a somewhat similar concern about mass proliferation of minor infringements: "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." *Id.* at 65.

scope of the "infringing" practice, copyright plaintiffs, in cases of this sort, would face insuperable obstacles to the protection of their rights. And, where one looks at the full scope of the activity in question, it seems clear that it tends to diminish the *potential* market for appellants' works.

II.
LIABILITY OF CORPORATE DEFENDANTS

[3, 4] We disagree with the district court's conclusion that even if it were to hold that home-use copying was an infringement under the Old and the New Acts and was not fair use, the court could not find the appellees Sonam, Sony, DDBI and the four retail stores liable for this type of infringement. 480 F.Supp. at 457.

At the outset, it is necessary to make a couple of observations about the district court's analysis. The court relied heavily on a "staple item of commerce"[15] theory in rejecting appellants' claims. The district court stated that "Selling of a staple article of commerce—*e.g.*, a typewriter, a recorder, a camera, a photocopying machine—technically contributes to any infringing use subsequently made thereof, but this kind of 'contribution,' if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management." 480 F.Supp. at 461. This reliance on the "staple article of commerce" theory was inappropriate. Appellees' analogy of videotape records to cameras or photocopying machines may have substantial benefit for some purposes, but does not even remotely raise copyright problems. Videotape re-

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[15]See 35 U.S.C. § 271(c) (defining contributory infringement in patent context and providing for exception for "a staple article or commodity of commerce suitable for substantial noninfringing use"); *Aro Mfg. Co. v. Convertible Top Co.*, 377 U.S. 476, 488-89, 84 S.Ct. 1526, 1533-34, 12 L.Ed.2d 457 (1964).

corders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Virtually all television programming is copyrighted material.[16] Therefore, videotape recorders are not "suitable for substantial noninfringing use." See 3 Nimmer *supra*, § 12.04[A] at 12-39, 12-40. That some copyright owners choose, for one reason or another, not to enforce their rights does not preclude those who legitimately choose to do so from protecting theirs.

A second observation about the district court's analysis is in order. The court found that the corporate appellees' knowledge was insufficient to make them contributory infringers. This was based, in part, on the court's assertion that "defendants here could not know what copyright law required. Before this lawsuit, that issue had not been determined." 480 F.Supp. at 460. It is not necessary that an alleged contributory infringer have actual knowledge that activity which he makes *possible* constitutes a copyright infringement. A copyright defendant's "innocence" does not absolve him of liability; it only affects the remedies available.[17] For example, the statute provides for a *reduction* of statutory damages if the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," 17 U.S.C. § 504(c)(2), and a *remission* of statutory damages, *in limited circumstances*, if the "infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use." *Id.* In this context, a defendant's mistake as to the legal consequences of his actions does not constitute an excuse for an infringement. It is only necessary that a copy-

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[16]For examples, see Nimmer, *supra*, § 12.04[A] at 12-39-40.

[17]3 Nimmer, *supra*, § 13.08. This discussion of "liability" obviously only pertains to civil, not criminal, liability.

right defendant have knowledge of the infringing *activity*. It cannot be argued that the corporate appellees cannot be held to have the knowledge that the Betamax will be used to reproduce copyrighted material, some of which appellants own. We adopt the district court's definition: "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (C.A.2 1971) (footnote omitted). There can be no doubt that the corporate appellees meet this definition.

First, the knowledge element is clearly satisfied. The corporate appellees "know" that the Betamax will be used to reproduce copyrighted materials. In fact, that is the most conspicuous use of the product. That use is intended, expected, encouraged, and the source of the product's consumer appeal. The record establishes that appellees knew and expected that Betamax's major use would be to record copyrighted programs off-the-air. Second, there is no doubt that appellees have met the other requirements for contributory infringement—inducing, causing, or materially contributing to the infringing conduct of another. The corporate appellees are sufficiently engaged in the enterprise to be held accountable. *See generally* 66 Va.L.Rev. at 1021-24; 31 Stan.L.Rev. at 257-260; 52 S.Cal.L.Rev. at 601-607; 81 W.Va.L.Rev. at 247-49.

III.
RELIEF

Because we have found that home videorecording constitutes copyright infringement and that appellees are liable for such use, the district court's judgment must be reversed and the case remanded for a consideration of the appropriate

relief. The relief question is exceedingly complex, and the difficulty in fashioning relief may well have influenced the district court's evaluation of the liability issue. The difficulty of fashioning relief cannot, however, dissuade the federal courts from affording appropriate relief to those whose rights have been infringed.

Appellants stated at oral argument that they were seeking a remand to the district court so that the district court could fashion the appropriate relief. This approach makes a good deal of sense; a district court is in a better position to resolve, in an appropriate fashion, the relief question.

There are a number of possibilities that the district court may want to consider. Because of the difficulty of proving the precise nature of the harm to appellants, statutory damages may be appropriate. 17 U.S.C. § 504(c). The district court also has a broad range of equitable remedies from which to choose. Section 502(a) provides that the court "may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." The district court determined that an injunction would not be an appropriate remedy. 480 F.Supp. 463-69. The court should reconsider this action.

We note that, as a general rule, a copyright plaintiff is entitled to a permanent injunction when liability has been established and there is a threat of continuing violations. Indeed, Nimmer states that "Generally, it would appear to be an abuse of discretion to deny a permanent injunction where liability has been established and there is a threat of continuing infringement." 3 Nimmer, *supra*, § 14.06[B] at 14-53—14-54. In discussing the analogous photocopying area, Nimmer suggests that when great public injury would result from an injunction, a court could award damages or

a continuing royalty.[18] This may very well be an acceptable resolution in this context.

In fashioning relief, the district court should not be overly concerned with the prospective harm to appellees. A defendant has no right to expect a return on investment from activities which violate the copyright laws. Once a determination has been made that an infringement is involved, the continued profitability of appellees' businesses is of secondary concern.

IV.
RETAIL STORE USE

We find no error with the district court's discussion of the fair use question in regard to the retail store use. Therefore, we affirm that portion of the decision.

V.
UNFAIR COMPETITION CLAIMS

In light of our previous discussion, we have decided to vacate the district court's earlier disposition of the unfair competition claims and remand for reconsideration. We express no view on the merits of these claims.

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[18] "Ordinarily it would be improper, and even an abuse of discretion for a court to deny a permanent injunction where liability and a threat of continuing infringement have both been established. But if one looks to other areas of property law it is clear that a property owner may be denied a permanent injunction against further violations of his property right where such an injunction would work a substantial injury to the public interest as well as to that of the particular defendant. *In such circumstances the property owner may be awarded, in lieu of an injunction, a reasonable royalty for the further use of his property. The courts might well conclude that photocopying practices for private use, particularly in the area of scientific writings, involve just such a public interest, so that a judicially created compulsory license as a substitute for injunctive relief could be found appropriate.*" 3 Nimmer, supra, § 13.05[E][4][e] at 13-91. [Emphasis added.]

VI.
CROSS-APPEAL

The appellees below have cross-appealed because of the district court's failure to receive evidence on three affirmative defenses: (1) laches and estoppel, (2) copyright invalidity, and (3) unclean hands/copyright enforceability. On this appeal, we reverse and remand. The district court should give appellees an opportunity to establish these defenses.

CONCLUSION

We find no Congressional intent to create a blanket home use exception to copyright protection and that home videorecording does not constitute fair use. In addition, the appellees are legally responsible for the infringing activity. The district court's decision must be reversed and the case remanded for appropriate proceedings. The court should consider the unfair competition claims and the affirmative defenses. If appellants prevail on the defenses, the district court should fashion appropriate relief.

The judgment of the district court is reversed in part, affirmed in part, and the case remanded for appropriate proceedings.

IT IS SO ORDERED.

APPENDIX B.

Opinion of the United States District Court, Central District of California.

UNIVERSAL CITY STUDIOS, INC., a corporation, dba Universal Television and Universal Pictures, and Walt Disney Productions, a corporation, Plaintiffs, v. SONY CORPORATION OF AMERICA, a corporation, the Sony Corporation, a corporation, Carter Hawley Hale Stores, Inc., a corporation, Associated Dry Goods Corporation, a corporation, Federated Department Stores, Inc., a corporation, Henry's Camera Corporation, a corporation, Doyle Dane Bernbach, Inc., a corporation, and William Griffiths, Defendants. No. CV 76-3520-F.

United States District Court, C. D. California.

Oct. 2, 1979. As Amended Dec. 5, 1979.

Owners of copyrighted audiovisual materials brought infringement action against manufacturers, distributors, retailers and advertisers of videotape recorder. The District Court, Ferguson, J., held that: (1) copyright holders of audiovisual materials, some of which were sold for telecast over public airwaves, did not have monopoly power over off-the-air copying of those materials by owners of video tape recorder in their homes for private, noncommercial use; (2) retailer did not infringe upon copyrights where it did not compete with nor profit from materials and intended only to demonstrate recorder; (3) even if home-use copying constituted infringement, neither manufacturers, distributors, retailers, nor advertisers were liable under theories of direct or contributory infringement or vicarious liability; and (4) even if they were deemed liable, injunctive relief was not available where they did not unfairly compete with owners of copyrighted materials nor interfere with their advantageous business relations.

Judgment for defendants.

Stephen A. Kroft, John G. Davis, Edwin M. Smith, Rosenfeld, Meyer & Susman, Beverly Hills, Cal., for plaintiffs.

Dean C. Dunlavey, Donald E. Sloan, Gibson, Dunn & Crutcher, Los Angeles, Cal., Max Freund, Ambrose Doskow, and Joel Sternman, Rosenman, Colin, Freund, Lewis & Cohen, New York City, for defendants Sony Corp. of America, Sony Corp. and Doyle Dane Bernbach Intern., Inc.

Marshall A. Rutter, Warren G. Greene, Rutter & Ebbert, Los Angeles, Cal., for defendants Carter Hawley Hale Stores, Inc., Associated Dry Goods Corp., Federated Department Stores, Inc. and Henry's Camera Corp.

FERGUSON, District Judge.

Article I, § 8, Cl. 8 of the United States Constitution empowers Congress: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Copyright Act passed by Congress in 1909 and revised in 1976 gives authors exclusive rights over some but not all uses of their works. As the Supreme Court wrote in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, S.Ct. 2040, 2044, 45 L.Ed.2d 84 (1974):

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. (footnotes omitted).

This case tests the scope of copyright protection for audiovisual material broadcast on public airwaves, and its resolution requires balancing of strong competing claims.

Plaintiffs, Universal City Studios, Inc. ("Universal") and Walt Disney Productions, Inc. ("Disney"), are producers and copyright owners of audiovisual material, some of which they choose to sell for telecast over public airwaves. Defendants include the manufacturer, Sony Corporation ("Sony"), and the distributor, Sony Corporation of America ("Sonam"), of the "Betamax," a videotape recorder ("VTR") which can record this telecast off-the-air and make a copy of the audiovisual material which can be viewed at another time. Other corporate defendants are certain retail stores (Carter Hawley Hale Stores, Inc.; Henry's Camera Corporation; Associated Dry Goods Corporation; and Federated Department Stores, Inc.) which sell the Betamax, and the advertising agency, Doyle Dane Bernbach Inc. ("DDBI") which promotes it. The only individual defendant is William Griffiths who used his Betamax in his home to copy plaintiffs' broadcast material for his own home use.

Plaintiffs' main contentions are that this recording and that of other individuals infringed their copyrights and that the corporate defendants are either direct or contributory infringers or are vicariously liable for the infringement. Plaintiffs also contend that defendants have interfered with their business relations and unfairly competed with them. Finally, plaintiffs assert that the retail defendants violated copyright law when they recorded portions of plaintiffs' programs to demonstrate the Betamax to a prospective purchaser.

Plaintiffs allege that they will suffer great monetary damage if this infringement is allowed to continue. Defendants contend that home copying for home use is not an infringe-

ment and, even if it were, defendants could not be held responsible under any theory of infringement or vicarious liability. The resolution of these issues first requires a determination of whether Congress gave authors monopoly power over this use and, if so, whether the corporate defendants are in any way liable. As will be discussed, these determinations are not easily made. Protection of the public interest requires balancing the need for wide availability of audiovisual works against the need for monetary reward to authors to assure production of these works.

After three years of litigation, five weeks of trial and careful consideration of extensive briefing by both sides, this court finds:

a) Neither the Copyright Act of 1909 ("Old Act") nor the revised Act of 1976 ("New Act") gave copyright holders monopoly power over an individual's off-the-air copying in his home for private, non-commercial use. This court is not deciding whether tape duplication or copying from pay television is prohibited. Nor is this court ruling on off-the-air recording by individuals or groups for use outside the home.

b) Even if the Copyright Act did prohibit home-use copying, Sony, Sonam, DDBI and the retail stores would not be liable under any of the theories of direct or contributory infringement or vicarious liability.

c) The retail defendants have not infringed plaintiffs' copyrights.

d) Even if home-use copying were infringement and defendants were deemed liable therefor, this court could not grant the injunctive relief requested by plaintiffs.

e) None of the defendants has unfairly competed with

plaintiffs or interfered with their advantageous business relations.

In so holding, this court makes the following factual findings.

THE PARTIES

Plaintiff Universal is a Delaware corporation with its principal place of business in Los Angeles County, California. Universal has done business under its own name and under the names, among others, of Universal Television, Universal Pictures, Universal 16 and United World Films. Universal is a wholly owned subsidiary of MCA, Inc. ("MCA"). Plaintiff Disney is a California corporation with its principal place of business in Orange County, California. Both Universal and Disney produce movies and other audiovisual works for theatrical and television exhibition.

Defendant Sony Corporation is a corporation duly organized and existing under the laws of the Country of Japan. Sony manufactures the Betamax videotape recorder. Defendant Sony Corporation of America is a New York corporation with its principal office in Los Angeles County, California. Sonam is a corporation duly organized and existing under the laws of the State of New York and qualified to do business and doing business in the State of California. Sonam distributes the Betamax in the United States.

Defendants Carter Hawley Hale Stores, Inc. ("Carter Hawley") and Henry's Camera Corporation ("Henry's Camera") are California corporations. Defendant Associated Dry Goods Corporation ("Associated/Robinson") is a Virginia corporation and defendant Federated Department Stores, Inc. ("Federated/Bullock's") is a Delaware corporation. All of these retail stores (the "retail defendants") do business in Los Angeles County, California and sell the Betamax.

Doyle Dane Bernbach, Inc. is a corporation duly organized and existing under the laws of the State of New York, and is and at all times material to this action was, doing business in Los Angeles County, California. DDBI is an advertising agency retained by Sony to advertise the Betamax.

Defendant William Griffiths is a resident and citizen of California and is an owner and user of the Betamax.

UNIVERSAL'S PRODUCTS

Universal produces motion pictures for exhibition in theaters and for television. Some of those released to theaters are subsequently licensed for television exhibition, either to pay television or to network television. Network telecasts generally consist of two or three runs. After network licensing and exhibition, Universal may license its theatrical motion pictures to local television stations in syndication (generally for three to eight runs) and occasionally will then redistribute them to the theaters. Universal also offers some of its theatrical motion pictures or excerpts thereof for rental to consumers, schools and institutions in the "non-theatrical" 16 mm and 8 mm exhibition markets.

Universal also recently began marketing theatrical motion pictures on prerecorded videodiscs. Many of these motion pictures were previously exhibited on television. In the future, Universal plans to releases theatrical motion pictures on discs before the first television exhibition as well as after the motion pictures have been televised.

Universal's made-for-television motion pictures consist of television features, weekly series and novels made for television (i.e., "mini-series"). With the exception of "Operation Prime Time," these motion pictures are first exhibited on network television. Universal's first run network licenses of series are usually executed before produc-

tion starts and are for two showings of each episode in the year of production, with an option to renew for each of the next four years. The number of yearly episodes of a series normally runs from 13 to 22. Universal executives testified at trial that the first run network license fee normally does not cover the cost of production of a series.

In recent years Universal has produced mini-series which are first licensed to a group of approximately 100 local stations under the title "Operation Prime Time." Licenses for these mini-series are also available on an ongoing basis to additional local stations. The Operation Prime Time licenses are generally for six runs with many of the stations telecasting the first two runs within seven days of each other.

After Universal's television products have been shown on network, approximately half of them are licensed for rerun exhibition on late night network, on network daytime television, and/or by syndication. A syndication requires approximately 60-120 episodes, which means 3-5 years of successful first run network exhibition if the package is all of one series. Syndication licenses of a successful series may be executed as early as the third year of first run network exhibition, but the syndication exhibition does not begin until after the fifth year. Once programming has been syndicated, it seldom goes back to network.

Series are syndicated for approximately six showings of each episode over 4-6 years; theater films are syndicated for 3-8 showings each over 3-6 years. Universal has approximately 54 series available for syndication and is adding new ones at a rate of two or three a year; it has approximately 2000 theater films in syndication, available by groupings. Altogether, it has over 3000 syndication licenses covering more than 300,000 different programs.

DISNEY'S PRODUCT

Disney has an extensive film library of animated and live action films resulting from 52 years of motion picture production for theater. Included in the library are approximately 24 feature length programs (both animated and live action) which Disney regards as "classics." These classics are exhibited only in theaters and are re-issued approximately every 7-10 years. They include such titles as *Snow White*, *Mary Poppins* and *Jungle Book*. Only three of Disney's feature length animated films have ever been licensed to television.

Disney licenses many of its other theatrical motion pictures to television, generally first for network exhibition and thereafter to pay television. On at least one occasion, however, Disney licensed a motion picture to pay television before licensing to network. Disney has not to date licensed any of its theatrical motion pictures in syndication. Many of Disney's theatrical motion pictures have been the subject of one or more network reruns. After network exhibition, Disney, like Universal, licenses some of its theatrical motion pictures for 16 mm rental. It also licenses excerpts of some for sale on 8 mm film. Within the past year, Disney has also offered some of its theatrical motion pictures for sale on videodisc.

Disney's library includes approximately 500 cartoons, each being 6-8 minutes in length. These cartoons receive varying kinds of exhibition, on a revolving basis, including theatrical, rental in the form of 16 mm full length films, and sale in the form of 8 mm excerpts.

The only programming currently licensed by Disney to a network is the one hour, weekly *Wonderful World of Disney*—pursuant to a contract with NBC executed in late 1977 and expiring in the fall of 1981. The license calls for

Disney to supply 24 "new" programs and 24 "repeat" programs each twelve months, with one lump sum being paid for four of these new programs and a uniform fee being paid each time Disney delivers one of the other 20 new programs. In the 1977-78 television season, six of the new programs were created for the series and the other 18 new programs came from Disney's library. The uniform fee per new show covers about 75% of the cost of each program created for the series and exceeds the cost of providing each of the "new" programs from Disney's library.

Programming supplied to NBC never is syndicated or licensed to others during the term of the contract but will be available later.

The only Disney programming now being exhibited by syndication is the New Mickey Mouse Club. This is a series of 104 half-hour episodes which was once syndicated in approximately 60 television markets and is now tailing out in the last 30 or 40 of these markets. This series is out of production and no new syndication licenses are being made.

BETAMAX AND OFF-THE-AIR RECORDING

Three components are required to record off-the-air and play back on the average television set: (a) the videotape recorder; (b) the tuner; and (c) the radio frequency adapter. When audiovisual materials are televised, the broadcaster telecasts radio frequency ("RF") signals over the public airwaves. The videotape recorder alone, however, does not receive and record these signals. A tuner is necessary to receive the RF signals and change them to audio and video signals. These signals are the ones recorded on the magnetic tape of the videotape recorder. To play this tape back on a regular TV or a monitor, an RF adapter is necessary to convert the audio-video signals to RF signals.

The Betamax machines contain all three components. Before Betamax, as early as 1965, Sony manufactured other videotape recorders—some of them with built-in adapters and tuners and others without. Sony and other manufacturers market and sell separately all three components. Thus, even without the Betamax machines, a person could assemble a system for off-the-air recording after purchasing the components separately.

The Betamax machine is marketed in at least four models: LV 1901, SL 7200, SL 8200 and SL 8600. These models vary in the options they offer. The SL 8600, for example, has a built-in timer and a remote pause control. The SL 8200 has a slowdown capacity which allows one to record two hours of material on a one-hour tape. These recorders range in price from approximately $875-$1000.

Sony also manufactures and sells tape cassettes for the various Betamax models. Some of these tapes can be used with only one particular Betamax model. None of the Sony cassette tapes can be used with other manufacturers' videotape recorders. The longest cassette tape made by Sony allows three hours of recording. The price for this 3-hour tape is approximately $21.

The Betamax tuner and RF reception capability is not dependent on the television set to which it is attached for playback. Betamax can record broadcasted material on one channel while the television set is off or is receiving and showing signals on another channel. Thus it is possible to view one show while taping another and to tape a show while not viewing at all, or even while away from home. This latter function is possible because the Betamax also includes a timer which can be set automatically to activate the recording system at a certain time.

The Betamax also includes a pause button and a fast forward capability. Sony has also developed remote control pause buttons and these are part of the 8600 model. Even prior to this, however, such devices could be added to one's system. The pause button allows an operator to stop whatever function—record, play, fast-forward, reverse—the machine is in. Therefore, if the individual views the material while it is being recorded and decides he doesn't want something on the tape, he can use the pause button to omit that segment of the broadcast from the recording. Of course, an individual must be both present and viewing to do this.

The fast forward makes it possible to avoid watching on playback a segment that has been recorded. While viewing the tape, an individual can fast forward through an undesired segment. For the most part, however, the viewer must guess as to when the undesired segment has been passed.

The Betamax and other Sony videotape recorders can also record signals from a video camera. Thus it is possible to purchase a camera, plug it into a videotape recorder, and make one's own film on a videocassette. This can then be played back on a monitor.

ADVERTISING

DDBI is Sonam's advertising agency for consumer products. Since the introduction of the first Betamax model, DDBI, in cooperation with Sonam, has created and published Betamax advertisements for magazines, newspapers and television. In November, 1975, Sonam agreed to indemnify DDBI for any liability arising from this advertising campaign.

Many of these national ads for the Betamax have been introduced into evidence. Some of these exhort the public to "record favorite shows" or "build a library." Some have suggested recording "novels for television" and "classic

movies." None of the Betamax advertisements warns that recording copyrighted shows is or may be a copyright infringement.

In addition to the DDBI national advertising campaign, Sonam operates a cooperative advertising program. Under this program, individual franchise dealers write and place ads for the Betamax and, if Sonam approves the ads, the local dealer receives 5% of the cost of the ads as a credit to the balance owed Sony for previously purchased merchandise.

Henry's Camera has participated in this program and has received credit for advertisements with "record your favorite show" and "build a library" language.

WARNINGS

None of the Betamax models or the brochures describing them contains warnings about copyright infringement. Pre-Betamax videotape recorders manufactured by Sony (the U-Matic, AV and CV series) had a small plate attached to the back stating: "This videotape recorder is not to be used to record copyrighted works."

The Betamax operating instructions, however, include a warning about possible copyright infringement. On page 17 of the instruction booklet, the following language appears: "Television programs, films, videotapes and other materials may be copyrighted. Unauthorized recording of such material may be contrary to the provisions of the United States copyright laws." The Betamax machine and this accompanying booklet are delivered to the purchaser in a sealed box.

The Betamax warranty states that there shall be no liability on the part of the manufacturer, distributor or seller for any loss or damage arising directly or indirectly from the use of the Betamax.

EVIDENCE OF HOME-USE COPYING

A. *William Griffiths*

Defendant William Griffiths started recording television programs off-the-air in 1973 or 1974 using a pre-Betamax videotape recorder made by Sony. He then learned about the Betamax while he was in Japan and instructed his sons to buy him one in the United States at the first opportunity. Griffiths owns a model 7200 purchased by his sons from defendant Henry's Camera. Griffiths never spoke to anyone at Henry's Camera about Betamax, and he was not induced to buy his Betamax by virtue of any advertisements. He owns approximately 100 tapes. When Griffiths bought his Betamax, he intended not only to time-shift (record, play-back and then erase) but also to build a library of cassettes. Maintaining a library, however, proved too expensive, and he is now erasing some earlier tapes and reusing them.

Griffiths copied about 20 minutes of a Universal motion picture called "Never Give An Inch," and two episodes from Universal television series entitled "Baa Baa Black Sheep" and "Holmes and Yo Yo." He would have erased each of these but for the request of plaintiffs' counsel that it be kept. Griffiths also testified that he had copied but already erased Universal films called "Alpha Caper" (erased before anyone saw it) and "Amelia Earhart." At the time of his deposition, Griffiths did not intend to keep any Universal film in his library.

Griffiths has also recorded documentaries, news broadcasts, sporting events and political programs such as a rerun of the Nixon/Kennedy debate.

Griffiths is a client of plaintiffs' law firm and consented to being a defendant in the lawsuit. Plaintiffs have waived

any claim for damages or costs against Griffiths for his activities alleged in the complaint. Plaintiffs never expected Griffiths to be represented by counsel and he has not been.

B. *Marc Wielage*

Mr. Wielage is not a defendant in this case. Plaintiffs do allege, however, that the corporate defendants are liable for any infringement of plaintiffs' copyrights by him.

Wielage is a video equipment salesman, he has an FCC license authorizing him to adjust commercial television transmitters, and he has been employed in the past as a professional switcher (between programs and commercials) at commercial television stations. The Betamax is Wielage's primary hobby; he even has a padded suitcase which he uses to carry his Betamax on trips with him. Wielage owns three Betamax recorders—a 7200, an 8200, and an SLO 320. He uses the SLO 320 with an outboard tuner and he has modified the other two. He owns approximately 340 Betamax tapes.

Wielage was recording television programs with a U-matic 1600 before Betamax was available. He knew videotape collectors and library builders who owned and used the U-matic to record off-the-air prior to Betamax. He bought Betamax because it was the first videotape recorder he could afford and he intended to use it to time shift and to build a library. Wielage writes articles of a technical nature for "Videophile" magazine, a subscription publication for VTR owners.

Wielage has recorded programs from pay television. He has traded tapes with some 25-30 people, most of whom he has contacted through the Videophile magazine. He exchanges "want lists" of films with these people. All of the tapes that Wielage has made or otherwise acquired are for

his own personal use, and he watches them either alone or with a few friends.

As a result of some research that he did, Wielage felt uncertain about the propriety of copying copyrighted material, but he did not rely upon anything from the defendants in forming his conclusions. The copyright warning in the Betamax instruction manual did not alter his usage.

The evidence showed that Wielage had recorded off-the-air from some Universal films—*viz.*, "Frankenstein," "Bride of Frankenstein," "Son of Frankenstein," "The Mummy," "Time of Their Lives," "Wolfman," "This Island Earth," "The Mummy's Hand," and "Duck Soup." He copied all of these prior to January 1, 1978. Of the remaining Universal films allegedly copied off the air by Wielage after January 1, 1978, only one, "Saboteur," was actually copied by Wielage. He acquired the others from friends, *viz.*, "Duel," "House of Frankenstein," "House of Fear" and "Horse Feathers."

Wielage copied at least one episode of the New Mickey Mouse Club. He also copied the following cartoons which were contained within six other episodes of the New Mickey Mouse Club: *viz.*, "Firechief," "Mickey's Parrot," "Trick or Treat," "Tortoise and the Hare," "Clock Cleaners," and "The Pointer." There was no evidence that he had recorded "Autograph Hound" as alleged. None of these cartoons bore its own copyright notice when Wielage made the copies. The only Disney film that Wielage copied after January 1, 1978 was an episode of *The Wonderful World of Disney* called "Chip and Dale/Mixed Nuts." Wileage also possessed recordings of the Disney films called "On Vacation With Mickey Mouse and Friends" and "This is Your Life Donald Duck."

C. *Mr. and Mrs. Clinton Bird*

Plaintiffs allege that Mr. and Mrs. Bird copied two episodes of a Universal television series entitled "Bionic Woman" and that defendants are liable for this infringement. There is no evidence to support this allegation except two tapes which plaintiffs' attorney said were made by the Birds.

D. *James Lowe*

Plaintiffs also allege that the corporate defendants are liable for copying done by Mr. Lowe. Lowe owns a 7200 Betamax and about 170 tapes. Lowe is an attorney who has formed his own opinion that it is legal to record off-the-air. Lowe is also the publisher of the "Videophile." No defendant is involved in the Videophile in any way.

Lowe recorded the Universal film "Psycho" and he intends to erase it. Lowe's son recorded a few 7-8 minute cartoons contained within episodes of the New Mickey Mouse Club and the two of them watched these together when Lowe got home from work. The cartoon titles were: "Donald Applecore," "Pluto's Quinpuplets," "Modern Inventions," "Two Chips and a Miss" and "Donald's Better Self." Lowe's own second recording was a cartoon entitled "Spare the Rod." None of the New Mickey Mouse Club episodes was recorded except for the foregoing cartoons.

Lowe generally views what he has recorded and then erases it. Lowe has erased some cartoons and would have erased the rest of them except that they are in the middle of tapes containing other items.

E. *Geoffrey Soule*

Geoffrey Soule owns a 7200 Betamax. He knew about other videotape recorders on the market, but the Betamax was the first he could afford. He could not remember seeing

any of defendants' ads before purchasing his Betamax. He bought the Betamax for time shift usage, and this proved to be about 95% of the actual use he made of it. He always had the impression (not gained from Sony) that it was permissible to record off television provided he did not sell what he copied. Soule's general usage of Betamax recordings was to watch once and then erase.

Soule did record the Marx Brothers movies "Horse Feathers," "Coconuts" and "Duck Soup" but he never watched a playback of any one. In fact, he planned to erase the movies because he was not watching them for lack of time and interest, and it was too expensive to keep them.

SURVEYS OF USAGE

Both plaintiffs and defendants conducted surveys of Betamax owners to ascertain use of the recorder. Field Research Corporation conducted plaintiffs' survey and Crossley Surveys, Inc. conducted defendants' survey. From June 27-July 7, 1978, plaintiffs interviewed by telephone 805 adults who identified themselves as the household member most familiar with the use of the VTR. Of the 805 interviewees, 23 owned a non-Sony VTR. From August 3-24, 1978, defendants interviewed by telephone 998 persons identified as the household member who uses the Betamax most frequently. Both surveys are extensive. Some of their findings are as follows:

* Plaintiffs' survey found that the average number of cassettes owned by the interviewees was 31.73. 63.9% of plaintiffs' interviewees had less than five cassettes with movies on them and 81.1% had less than five cassettes with television programs on them. Defendants' interviewees reported an average of 25.21 cassettes with material recorded off-the-air.

* According to plaintiffs' survey, 75.4% of the VTR owners use their machines to record for time-shifting

purposes half or most of the time. Defendants' survey showed that 96% of the Betamax owners had used the machine to record programs they otherwise would have missed.

* When plaintiffs asked interviewees how many cassettes were in their library, 55.8% said there were 10 or fewer. In defendants' survey, of the total programs viewed by interviewees in the past month, 70.4% had been viewed only that one time and for 57.9%, there were no plans for further viewing.

* According to plaintiffs' survey, 58.3% of the owners eliminate commercials from the recording either "sometimes," "rarely," or "never"; 56.1% use the fast-forward to pass commercials either "sometimes," "rarely," or "never."

* Defendants found that 82.4% of the recording done by Betamax owners in the past month was done while they were gone or viewing another channel (and therefore could not use the pause button to eliminate the commercials). 17.6% of the recording was done while viewing, with the pause button being used 8.1% of the time. While viewing playbacks in the past month, defendants' interviewees fast-forwarded through commercials in 24.6% of them.

* Defendants further found that for 89.8% of the interviewees, most of the cassette playback was with family members only. 81.9% of the defendants' interviewees watched the same amount or more of regular television as they did before owning a Betamax. 83.2% reported their frequency of movie going was unaffected by Betamax.

RECORDING BY RETAIL DEFENDANTS

Plaintiffs hired Paul Ruid, a private investigator, to visit retail stores to observe videotape recorder marketing practices. Plaintiffs' attorneys instructed him to ask for demonstrations.

Ruid visited the Broadway (Carter Hawley) on October 1, 1976 and asked for a demonstration of the Betamax. The salesman showed him a playback of part of an unidentified episode from a Universal series called "Adam 12." It was never determined who had made the recording.

Ruid visited the Broadway again on October 18 at a time when he knew that an old Universal series called "Major Adams" was being telecast. Ruid again asked for a demonstration and this time added a request that "something in the nature of an old movie" be recorded. As he had hoped, a portion of "Major Adams" was recorded.

Ruid visited Associated/Robinson's on October 14, 1976, at a time when he knew that a Universal series called "Gemini Man" was being telecast. He found "Gemini Man" already being shown on television demonstration sets at the store, and he asked for a demonstration of the Betamax. The salesman made two 8-minute recordings of the program, the second to correct what he thought was an error in the first.

Ruid visited Federated/Bullock's on October 14, 1976 at a time when he knew that a Universal mini-series called "Captains and the Kings" was being telecast. He found the television demonstration sets already showing an episode from "Captains and the Kings," and he requested a demonstration of Betamax. In response, the salesman put the Betamax in the record mode. Ruid never saw a playback, and he could not say whether "Captains and the Kings" had been successfully recorded.

Nobody but Ruid ever saw the demonstration playbacks which he had requested and Ruid never saw Betamax demonstrated to anybody else. Ruid did not go to Henry's Camera and request a demonstration. Henry's Camera normally records for about one minute during customer demonstrations at its store.

HARM TO PLAINTIFF

Plaintiffs admitted that at the time of trial, no existing contract, license or advantageous business relationship of either Universal or Disney had been injured, interfered with or disrupted by the sale or use of Betamax and Betamax tapes or by any other activity of any defendant. This includes without limitation plaintiffs' theatrical, television, 8 or 16 mm, and video-disc products.

In addition, plaintiffs conceded that neither the sale nor the use of Betamax and Betamax tapes had by the time of trial caused Universal or Disney any measurable monetary damage, economic loss or revenue loss. 1978 was a very successful year for both Universal and Disney. It was Disney's eleventh consecutive year of increased profit and the most profitable year in history for Universal Pictures' Theatrical Division. Universal's television revenues had increased steadily over the three years prior to trial and Disney received its highest television income in 1978.

Plaintiffs did present extensive expert testimony at trial on the issue of prospective harm. Executives of both Universal and Disney testified that in the future Betamax would decrease the value of their copyrights in a number of ways, *e.g.*, by exhausting interest in reruns and by fragmenting the live television audience. These predictions are discussed extensively below. Uniformly, however, these experts were unable to predict at what point in either time or Betamax sales such harm would occur.

THE BROADCASTING INDUSTRY

There are 727 commercial television stations in the United States, 516 broadcasting very high frequency ("VHF") signals and 211 broadcasting ultra high frequency ("UHF") signals. These commercial stations are spread out geographically over approximately 235 television "markets."

There are currently three commercial television networks in the United States, each network owning and operating ("O&O") some television stations and having many more stations as "affiliates"—each such station being the network's exclusive outlet in its particular market. Those stations which are not owned by, or affiliated with, a network are called "independents." Each network feeds programming to its affiliates from approximately 7:00 a. m. to 11:00 p. m., with approximately five hours of local programming interspersed in that time period. The network pays the affiliate to broadcast its material. The affiliate can reject the network programming and broadcast local programming if it wishes. The affiliate can also tape the network programming and broadcast it up to seven days at a time when no network programming is being provided.

The commercial networks and stations obtain their revenue primarily from advertisers, who pay to have their commercials telecast. Advertisers buy time (1) on network programming, (2) on a national "spot" basis, and (3) on a local basis—the individual stations receiving the revenue directly on the latter two bases. A typical affiliate station obtains 10% of its revenue from the network and 45% each from national spot and local advertising. The network feed contains commercials but also allows "station breaks or position," wherein the local station may insert national "spot" or local advertising and keep the revenue.

The prevailing "unit" of commercial advertising time is 30 seconds. The rule of thumb is that the larger the perceived rating of the program carrying the commercial, the larger the advertising fee. This fee can run from $45,000 to $125,000 per 30 second commercial for a prime time network slot.

There are also 259 public/educational television stations in the United States, 101 being VHF and 158 being UHF,

none of which is commercial network owned or affiliated. Approximately 200 of the public/educational stations are interconnected by a network called the Public Broadcasting Service. Some educational stations are also members of regional networks—*i.e.*, the Eastern Educational Network.

The public/educational stations do not carry advertising and obtain their operating funds from individual and governmental contributions.

The three commercial networks obtain their programming, in part, by virtue of licenses each makes with producers to show the producer's programs. Individual stations, *viz.*, O&O's affiliates and independents, also make such licenses with producers—through syndication. Syndication, as indicated earlier, is generally undertaken only for rerun material—and often is for a kind of exhibition called "stripping," which means running the same series at the same time of day five days a week. Individual stations also create some of their own programming—*i.e.*, commercial stations approximately 16 hours per week and public/educational stations approximately 11 hours per week.

RATINGS

The fees which networks and stations pay producers to show their programs, and the fees which advertisers pay networks and stations to show their commercials (sometimes measured in "cost per thousand," *e.g.*, $5/1000 households) are influenced substantially by the size and demographics of the audience which the programs (and hence the commercials) are expected to reach. For rerun programming, larger audiences obtained during prior showing generally increase the expected audience, and hence the fee, for rerun licensing.

Audience measurement uses several criteria. One size criterion is "ratings"—one rating point is one percent of

all homes owning television sets in the relevant market. Nationally, there are approximately 75 million homes owning television, and one national rating point represents 750,000 homes. There is believed to be an average of two individuals viewing television in each home. Another size criterion is "market share"—a percentage figure, indicating what percent of all homes using television ("HUT"), *i.e.*, with television sets turned on in the relevant market at a given time, is tuned to a particular network or station. The criterion of "demographics" is basically a measurement of sex, age, and income bracket of the audience.

Nielsen and Arbitron perform audience measuring services for broadcasters, advertisers, and producers. Nielsen's National Television Index is a ratings service in which a meter attached to each television set in 1200 sample households continuously records what channel the set is tuned to while in use. This meter service does not tell who, if anyone, is watching the set. Ratings measurements are subject to a margin of error of plus or minus 1 to 1½ points. Nielsen's National Audience Composition Service surveys 2400 sample households by providing diaries in which the households keep a record of the viewing actually done by individuals in the household. Diaries are also the source of demographic information. Nielsen also provides a meter service comparable to its national meter service in four local markets. Nielsen's fourth service is the Nielsen Station Index, which uses diaries and reports individually and periodically on some 200 local market areas. These latter diaries, distributed to households four times a year during so-called "sweep periods," cover four weeks each.

The Nielsen meter services already measure videotape recording but do not yet make any measure of playback. At the time of trial, the Nielsen diary surveys made no specific reference to videotape recorder usage, and the only

playback information obtained was what people volunteered in the diary.

The Arbitron rating service provides a meter service in three local markets and also a diary service in individual markets in the rest of the country. Arbitron also has sweep periods which are almost the same as Nielsen's. Arbitron was not measuring any videotape recorder usage at the time of trial.

Both Nielsen and Arbitron are capable of obtaining substantially the same kind of information with respect to videotape recorder usage as they presently do with respect to television set usage. Both Nielsen and Arbitron have conducted pilot surveys with videotape recorder owners in order to develop a framework for additional survey work, all leading to the ultimate measurement of videotape recorder usage.

In attempting to maximize ratings and audience shares, networks frequently broadcast their better and stronger programs at the same time—a practice known as "counter-programming." Heightened competition during sweep periods encourages counter-programming.

LEGAL CONTENTIONS

The above discussion sets forth the factual background for this lawsuit. The fundamental legal premise of this litigation is plaintiffs' contention that the activity of the individual and the retail defendants in recording plaintiffs' copyrighted works off-the-air is copyright infringement. With this basis, they assert that the involvement of Sony, Sonam, DDBI, and the retail stores in the manufacturing, distributing, advertising, and selling of the Betamax makes the defendants liable as direct or contributory infringers or under the theory of vicarious liability. Finally, building on these assertions, plaintiffs look to the economic arrange-

ments of today's broadcasting industry and foresee irreparable harm to themselves from these allegedly infringing activities. They ask this court for injunctive relief to prevent future infringement.

Plaintiffs' legal argument depends on the basic assumption that the off-the-air recording of their works by defendant William Griffiths and other individuals as well as by the retail defendants constitutes infringement. Because plaintiffs predict the greatest harm from individuals' home-use copying, this court has considered the issue of infringement first with respect to home-use recording and then with respect to the retail defendants' store demonstrations.

HOME-USE RECORDING

"Home-use" recording as used in this opinion is the operation of the Betamax in a private home to record a program for subsequent home viewing. The programs involved in this lawsuit are broadcast free to the public over public airwaves. The court heard extensive testimony from defendant William Griffiths and four non-defendant individuals about this activity, and the court's declaration of non-infringement is limited to this home use-situation.

It is important to note the limits of this holding. Neither pay nor cable television stations are plaintiffs in this suit and no defendant recorded the signals from either. The court is not ruling on tape swapping, organized or informal. The court is not ruling on tape duplication within the home or outside, by individuals, groups or corporations. Nor is the court ruling on off-the-air recording for use outside the home, *e.g.*, by teachers for classrooms, corporations for employees, etc. No defendant engaged in any of these activities and the facts necessary to determine their legality are not before this court.

The ramifications of this new technology are greater than the boundaries of this lawsuit. A court reviewing the limited claims of specified parties in a particular factual setting cannot and should not undertake the role of a government commission or legislative body exploring and evaluating all the uses and consequences of the videotape recorder.

I. *INFRINGEMENT AND FAIR USE*

Recordings made prior to January 1, 1978 are governed by the Old Act (1909) and those made after that date are governed by the New Act (1976). The testimony showed that Marc Wielage had recorded two broadcasts, one Universal and one Disney, after January 1, 1978. All other incidents of copying occurred prior to that date, and these included the recording of five Universal titles by defendant Griffiths; nine Universal and seven Disney by Wielage; two Universal by Soule; one Universal and six Disney by the Lowes; and two Universal by the Birds.

This court finds that this home-use recording is not an infringement under either the Old Act or the New Act. This finding rests on statutory interpretations of both the Old and the New Acts, the legislative history of the New Act, and the doctrine of fair use.

A. *The Old Act*

Section 1 of the Copyright Act, 17 U.S.C. § 1, gave the copyright owner the "exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work; . . . ." Under this broad, unqualified language, Betamax recording appears to be an infringing activity. The legislative history does not discuss home-use recording; in 1909, television and its ensuing technology was not even contemplated by Congress.

[1] In applying the Old Act, courts created the fair use doctrine to immunize some forms of copying from the literal implications of the statute. The fair use doctrine is discussed extensively below. This court concludes that home-use copying is fair use. This conclusion is based on the doctrine as it was developed by the courts under the Old Act and left unaltered by the New Act. Therefore, this conclusion applies equally to instances of home-use recording under the Old and New Acts.

B. *The New Act*

[2, 3] Copyright holders have monopoly power only over those uses of their works that Congress has protected through legislation; their rights do not exist independent of Congressional action. The broad language of the New Act suggests that copyright holders have monopoly power over all reproductions of their works. Legislative history, however, shows that Congress did not intend this broad statement to include reproductions of sound recordings for home use. The central question here is whether Congress intended the same language to give copyright holders of audiovisual works monopoly power over off-the-air recording of their works for home use. Legislative history does not show this intent. On the occasions when the issue was discussed by Congress, all indications were that Congress did not intend to give monopoly power over this use. This legislative history is surveyed below.

Section 106 of the New Act provides:

> § 106. Exclusive rights in copyrighted works
>
> Subject to sections 107 through 118 [17 U.S.C. §§ 107-118], the owner of copyright under this title [17 U.S.C. §§ 101 *et seq.*] has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Plaintiffs contend that this statutory language is clear. According to them, § 106(1) gives the owner of the copyright an unqualified and exclusive right to "reproduce the copyrighted work in copies or phonorecords." Plaintiffs urge that if Congress had intended to allow home-use copying, it would have made express qualifications as it did in subsections (4) and (5) of § 106.

Defendants respond, and this court agrees, that interpretation of the New Act's language is not that simple. Legislative history must be examined. As the Supreme Court wrote in *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 9-10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976):

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA [Federal Water Pollution Control Act] in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can

> be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " *United States v. American Trucking Assn.*, 310 U.S. 534, 543-544, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345, 1351 (1940) (footnotes omitted).

The language in § 106 is general and broad. It appears to apply to every situation involving reproduction of a copyrighted work. It does not reflect the specific attention Congress gave to several types of reproduction. As the legislative history shows, Congress did not always draft statutory language to reflect its intent.

In 1955, Congress began revising the Copyright Act of 1909. From 1955 to 1976, the Office of the Register of Copyrights worked with Congress to draft the new legislation and focus issues of concern. Comprehensive revision was a complex and controversial effort. In 1971, the process was impeded by strong disagreement about the treatment of cable television in the revised statutory framework. By the same year, the problem of record piracy had become severe. Relief for this problem was blocked by the dispute over the cable television portions of the revision act. Rather than waiting for complete revision, Congress passed an amendment to the Old Act to deal with sound recording piracy. This amendment became subsection (f) of § 1 of the Old Act and established limited copyright protection for owners of sound recordings. This subsection (f) was not distinct and separate from the comprehensive revision under way in Congress. Its language was lifted from the earlier general revision bills, and it was incorporated virtually verbatim into § 106 *et seq.* of the New Act. As the Librarian of Congress wrote to the Chairman of the Senate Judiciary Committee on January 19, 1971:

> In general, we also support the amendatory language adopted in the bill which *draws heavily upon the lan-*

guage of the bill for general revision of the copyright law (S. 543) . . .

. . . . . .

The most fundamental question raised by the bill is its relationship to the program for general revision of the copyright law. The revision bill before your committee this past session and which Senator McClellan proposes to reintroduce, has parallel provisions, and if general revision were on the threshold of enactment S. 4592 would be unnecessary. However, some fundamental problems impeding the progress of general revision of the copyright law, notably the issue of cable television, have not yet been resolved. We agree that the national and international problem of record piracy is too urgent to await comprehensive action on copyright law revision, and that the amendments proposed in S. 4592 are badly needed now. *Upon enactment of the revision bill, they would, of course, be merged into the larger pattern of the revised statute as a whole.*

S.Rep.No.72, 92d Cong., 1st Sess., 7-8 (1971) (emphasis added).

A comparison of the statutory language shows that the amendment was merged into the New Act. This incorporation is significant because Congress, in passing the legislation, clearly expressed its intent not to restrain home sound recording from broadcasts, tapes or records where the recording is for private, non-commercial use. As the House Report which accompanied the 1971 Amendment stated:

Home Recording

In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention

> of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.

H.Rep.No.487, 92d Cong., 1st Sess. 7, *reprinted in* [1971] U.S.Code Cong. & Admin. News, pp. 1566, 1572.

Thus, while the language of § 106 of the New Act appears to give copyright holders exclusive rights over all recordings, the Congressional intent was that home-use sound recording was not prohibited. Holders of copyrights in sound recordings were not to have any "broader rights than are accorded to other copyright proprietors." U.S.Code Cong. & Admin.News 1971, p. 1572. Defendants contend that, as with home-use sound recording, Congress did not intend to protect copyright holders from off-the-air audiovisual recording for home-use, even though the statute does not expressly so state.

The issue of home-use recording was not addressed in any subsequent House or Senate report. The reports accompanying the 1976 general revision legislation did not restate Congressional refusal to give monopoly power over home-use recording, but the language of the 1971 Amendment was incorporated into the New Act without any suggestion that legislative intent had changed.

The 1971 House Report is not the only support for a finding that the Copyright Act does not prohibit home-use recording. Home-use recording from radio and television broadcasts was discussed in committee hearings, floor debates and reports from the Office of Copyrights. Statements

from all three sources are relevant to a determination of legislative intent.[1]

In June, 1971, Subcommittee No. 3 of the House Committee on the Judiciary met in hearings on the sound recording amendment. Representative Beister of Pennsylvania engaged in the following dialogue about off-the-air recording with Ms. Barbara Ringer, then Assistant Register of Copyrights:

> MR. BEISTER. I do not know that I can add very much to the questions which you have been asked so far.
>
> I can tell you I must have a small pirate in my own home.
>
> My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set.
>
> Now, he may retrieve in addition something else onto his recording, but nonetheless, he does retrieve the basic sound, *and this legislation, of course, would not point to his activities, would it?*
>
> MISS RINGER. I think the answer is clearly, "*No, it would not.*"
>
> I have spoken at a couple of seminars on *video cassettes lately, and this question is usually asked: "What about the home recorders?"*

---

[1]*See Simpson v. United States*, 435 U.S. 6, 13, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978) (statements by committee chairmen and bill sponsors are entitled to great weight); *Zuber v. Allen*, 396 U.S. 168, 192, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969) (departmental construction of its own enabling legislation carries most weight when department administrators participated in drafting and expressed their views to Congress in committee hearings); *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 259-60, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966) (statements of committee members may be considered) and *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 616 (3d Cir. 1961), *cert. denied*, 372 U.S. 965, 83 S.Ct. 1087, 10 L.Ed.2d 128 (1963) (comments during floor debate by a sponsoring senator may be considered).

> The answer I have given and will give again is that *this is something you cannot control. You simply cannot control it.*

Hearings on S. 646 before the Subcomm. No. 3 of the House Judiciary Comm., 92d Cong., 1st Sess. 22 (June 9 and 10, 1971).

Ms. Ringer proceeded to discuss the problem of unauthorized video recordings finding their way into the market. She recognized that this was a problem which Congress might face in the future but stated that it could not be met by carrying copyright enforcement into the home or by banning devices for off-the-air recording. Her testimony continued:

> But *I do not see anybody going into anyone's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping.*
>
> MR. BEISTER: Secondly *with respect to video cassettes*, are we approaching an additional problem, *not with respect to private use*, but with respect to public distribution after it has been retrieved over a home set?
>
> MISS RINGER: The answer is very definitely, "yes."
>
> For years the motion picture industry has been faced with bootlegging problems, much of it deriving from the 10 mm prints that were distributed to the Armed Forces and got out of control. The film industry has had a very active policing activity for years.
>
> I think that this problem is going to undergo a quantum increase when video cassette recorders are freely available. But I would say that there is a big difference, and I think it is something that you might consider. In that area, they have got copyright protection, and in this area, who knows? *It is certainly not protectable under the Federal statute.*

Id. pp. 22-23.

When the 1971 Amendment reached the House floor, the question of noncommercial home recording was raised by Representative Kazen of Texas and answered by Representative Kastenmeier. Representative Kastenmeier was chairman of the House Judiciary Subcommittee responsible for the New Act, a sponsor of the general revision legislation, and a member of the Conference Committee which put the New Act in final form. The dialogue was as follows:

> MR. KAZEN. Am I correct in assuming that the bill protects copyrighted material that *is duplicated for commercial purposes only?*
>
> MR. KASTENMEIER. Yes.
>
> MR. KAZEN. In other words, if your child were to *record off of a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?*
>
> MR. KASTENMEIER. *This is not included in the bill. I am glad the gentleman raises the point.*
>
> On page 7 of the report, under "Home Recordings," Members will note that under the bill the same practice which prevails today is called for; namely, *this is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes.* This is made clear in the report.

117 Cong.Rec. 34, 748 (1971).

Treatment of home-use recording is consistent outside the legislative history, as well. Indeed, since 1955, the Copyright Office of the Library of Congress and the Register of Copyright consistently avoided and even opposed efforts to protect copyright owners against home-use recording.

In 1961, the Office issued a report which urged that private performance of a copyrighted film or motion picture

not be restrained. The Register contended that statutory damages for such infringement "would be grossly excessive" and that "private performances could rarely be discovered or controlled." The Register directly confronted the issue of home-use videotape recording:

> New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright.

Copyright Law Revision, Report of the Register of Copyrights (July, 1961), p. 30.

As discussed above, the Copyright Office, through Barbara Ringer, continued to advocate this view throughout the years of legislative revision. The Office was an active participant in drafting, promoting and explaining the legislation for Congress and always maintained that home-use recording is not an infringement.

This position of the Office developed in part from a concern about invasion of the individual's privacy in his home. As Ms. Ringer testified, home recording simply cannot be controlled. Nobody is going into anyone's home to prevent it. The fears of Representatives Beister and Kazen that the legislation would reach their children's activities in their homes were not realized. Of course, not all activity is made legal by virtue of occurring in a private home. Congress can constitutionally legislate against some activity which may occur in the home, but doing so necessarily requires caution. Here, legislative history shows that, in balance, Congress did not find that protection of copyright holders' rights over reproduction of their works was worth the privacy and enforcement problems which restraint of home-use recording would create.

C. *Fair Use*

[4] Analysis of whether home-use recording is an infringement cannot end with the statutory language and legislative history. While the Old Act was in effect, courts devised the doctrine of fair use, which creates a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner . . . ." *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *quoting* Ball, *Copyright and Literary Property* 260 (1966). Fair use has always been a doctrine without rigid definition. "The line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria." *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1978) (citations omitted).

In this case, new technology has spawned a copyright question of first impression. This court finds that the legislative history of the New Act shows that Congress did not intend to restrain the home-use copying at issue here. Even if this finding were erroneous, the legislative history would be sufficient to raise doubts about the meaning of the statutory language of § 106. This language appears to give copyright holders the exclusive right to reproduce their works in copies or phonorecords. Yet legislative history shows an intent to allow home-use copying of both sound recordings and broadcasted audiovisual material.

In *Twentieth Century Music Corp. v. Aiken, supra*, 422 U.S. at 156, 95 S.Ct. at 2044, the Supreme Court stated that "[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in

light of [its] basic purpose." (footnote omitted). The fair use doctrine is a tool for such construction.

The New Act did not change fair use. It did, however, codify the doctrine for the first time and characterize fair use as non-infringement rather than excused infringement. In doing so, both the House and the Senate emphasized that they did not intend to alter the judicial fair use doctrine:

> The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.
>
> Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R.Rep.No.1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* [1976] U.S.Code Cong. & Admin.News, pp. 5659, 5680; S.Rep.No.473, 94th Cong., 1st Sess. 62 (1975).

As Congress recognized, the doctrine of fair use must be flexible to deal with technological change. It is an equitable tool for balancing competing claims in copyright cases. The Copyright Act gives copyright owners control of only some uses of their works. *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 393-94, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968). The Copyright Act is premised on the belief that

the public will benefit when authors are given exclusive rights leading to economic reward and encouragement for continued contribution to the arts and sciences. As H.R.Rep.No.2222, 60th Cong., 2d Sess. 9 (1909), stated about the 1909 Act, copyright is "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public."

The public benefit derived from the copyright scheme, however, depends on careful balancing. If an author's exclusive rights over his work were unlimited, his personal economic incentive could surpass what is necessary for encouragement and actually work against the public by decreasing access to these works. The Supreme Court recognized this balancing in *Twentieth Century Music Corp. v. Aiken, supra,* 422 U.S. at 156, 95 S.Ct. at 2044:

> The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal,* 286 U.S. 123, 127, 52 S.Ct. 546, 547, 76 L.Ed. 1010. (citations and footnotes omitted).

Other courts, too, have noted the competing goals of the copyright laws. *See, e.g., Williams & Wilkins v. United States,* 487 F.2d 1345, 1352, 203 Ct.Cl. 74 (1973), *aff'd per curiam by an equally divided court,* 420 U.S. 376, 95 S.Ct. 1344, 43 L.Ed.2d 264 (1975): ". . . the development of 'fair use' has been influenced by some tension between the direct aim of the copyright privilege to grant the owner a right from which he can reap financial benefit and the more fundamental purpose of the protection 'To Promote

the Progress of Science and the useful Arts.' " (citation omitted).

One commentator has suggested that the question of fair use arises where the expectations of the author and the public meet.

> [T]he author expects that the copyright scheme itself will sometimes require use of his work necessary in the public interest for which he will not be paid, and society expects that the copyright scheme will either allow such use without reducing the author's incentive or impose no excessive burdens on the public when use is controlled. Put another way, in entrusting their respective interests to the copyright scheme, author and society each takes a risk that the costs to each would not be unacceptable.

L. Seltzer, *Exemptions and Fair Use in Copyright*, at 30 (1978).

The fair use doctrine, as articulated in judicial opinions, is not so concise. The courts have identified four factors for determining fair use. In *Williams & Wilkins*, *supra*, at 1352, these were identified as "(a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use on a copyright owner's potential market for and value of his work." These same four factors were codified almost verbatim in § 107 of the New Act.

> § 107. Limitations on exclusive rights: Fair use
>
> Notwithstanding the provisions of section 106 [17 U.S.C. § 106], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for class-

room use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

This section's language shows that the factors listed are neither exclusive nor required. The factors are illustrative, not definitive. As has been noted, the statute gives no guidance as to the relative weight of the factors and only generally defines the scope of each. 3 *Nimmer on Copyright* § 13.05[A].

Thus, courts are left with great discretion to consider new factors and interpret those codified in new ways. As Congress acknowledged in the House and Senate Reports on the New Act quoted *supra*, such flexibility is necessary in an era of great technological development.

This case invites application of the fair use doctrine to new technology in a new context: off-the-air videotape recording at home for noncommercial home use. While no court has previously addressed this issue, fair use doctrine cases do suggest both an approach and an answer.

The parties' briefing has focused on three cases which illustrate the treatment of fair use in a noncommercial context. Neither these cases nor any others within this court's knowledge, however, discuss copying within a private home using signals beamed over public airwaves.

The three cases addressing fair use in the noncommercial context are *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1963); *Williams & Wilkins v. United States*, *supra;* and *Encyclopaedia Britannica Educational Corp. v. Crooks*, 447 F.Supp. 243 (W.D.N.Y.1978). Their facts must be reviewed.

In *Wihtol*, a church choir director incorporated the entire copyrighted hymn "My God and I" into a new arrangement which was publicly performed by both a high school and a church choir. The Eighth Circuit found the choir director directly liable for infringement and the employer church liable under the doctrine of *respondeat superior*.

In *Encyclopaedia Britannica*, the district court granted a preliminary injunction to plaintiffs, producers of educational audiovisual works, against defendants, local government officials who would tape plaintiffs' works off-the-air, make copies of them and distribute them to the schools. In granting this preliminary relief, the court held that the fair use defense did not overcome plaintiffs' showing of a *prima facie* case. The court first carefully distinguished *Williams & Wilkins*, discussed *infra*, and then held:

> The scope of BOCES' activities is difficult to reconcile with its claim of fair use. This case does not involve an isolated instance of a teacher copying copyrighted material for classroom use but concerns a highly organized and systematic program for reproducing videotapes on a massive scale. BOCES has acquired videotape equipment worth one-half million dollars, used five to eight full-time personnel to carry out its program, and makes as many as ten thousand tapes per year. For the last twelve years, these tapes have been distributed throughout Erie County to over one hundred separate schools.

> Considering all of these factors, I find that the plaintiffs have established a prima facie case entitling them to preliminary relief. As BOCES points out, the applicability of the defense of fair use raises numerous questions of fact which cannot be resolved without a full trial on the merits. At this stage in the proceedings, I find that the substantiality of the copying and the possible impact on the market for education films tip the balance in favor of the plaintiffs, outweighing BOCES' noncommercial, educational purpose in copying the films.

447 F.Supp. at 252.

In *Williams & Wilkins,* the Court of Claims found that copying by the National Institute of Health ("NIH") and the National Library of Medicine ("NLM") of entire articles published in plaintiff's journals was fair use under the Old Act. The court relied on many factors "and not upon any one, or any combination less than all." 487 F.2d 1345 at 1362. While these factors included elements of the traditional four, the court exercised its discretion to consider other factors it deemed relevant to the issue of fair use in the particular factual context.

The court listed eight factors. First, the court noted that NIH and NLM are nonprofit institutions and that with both the libraries and the requesters, "scientific progress, untainted by any commercial gain from the reproduction, is the hallmark of the whole enterprise of duplication." 487 F.2d at 1354. Second, the court relied on the two-part factor of "a system of limitations" imposed and enforced by the institutions and the "effectiveness of that system to confine the duplication for the personal use of scientific personnel who need the material for their work . . . ." 487 F.2d at 1355. This factor, in the court's view, reduced the significance of the absolute number of copies of an article which

must be made. Third, the court found it significant that photocopying had been going on ever since the Copyright Act was adopted with "apparent general acceptance" and asked "whether this marked increase in volume [through improved technology] changes a use which was generally accepted as 'fair' into one which has now become unfair." 487 F.2d at 1356. Fourth, the court was convinced that "medical science would be seriously hurt if such library photocopying were stopped." *Id.* Fifth, the court held that the "record simply does not show a serious adverse impact, either on plaintiff or on medical publishers generally, from the photocopying practices of the type of NIH and NLM." 487 F.2d at 1359. Sixth, the court was reluctant to find infringement because of the "grave uncertainty of the coverage of 'copy' in Section 1 of the 1909 Act . . ." *Id.* The court noted that "this is now preeminently a problem for Congress . . . ." 487 F.2d at 1360. Seventh, the court reviewed legislative reports for revision of the 1909 Act and found it showed that photocopying can be "fair use" in proper circumstances. 487 F.2d at 1361. Finally, the eighth factor which the court found relevant to fair use was that foreign countries have statutes which allow such photocopying. *Id.*

The *Williams & Wilkins* case, affirmed by an evenly divided Supreme Court, has little precedential value. Its holding is specifically limited to its unique factual situation. Furthermore, it has been strongly criticized,[2] with the harshest criticism leveled at the Court's treatment of the harm issue (discussed *infra*). The value of the case lies in its demonstration of the relevance of the fair use doctrine when copyright protection is tested by new technology and noncommercial use.

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[2]*See e. g.*, 3 *Nimmer on Copyright* § 13.05[E].

Wihtol and *Encyclopaedia Britannica* are also of little precedential value. *Wihtol* involved public performance of the copyrighted material. *Encyclopaedia Britannica* is limited because it was an opinion granting only preliminary relief. The court was not conclusively finding infringement but rather only a *prima facie* case thereof. Even if that court had made a final determination on infringement, the case nonetheless would be more dissimilar to the situation here than similar. The most important difference is that it did not involve home-use off-the-air recording but rather "a highly organized and systematic program for reproducing videotapes on a massive scale." 447 F.Supp. at 252.

A comparison of the factual settings in the decided cases with that of the present case reveals two distinguishing factors:

(1) Home-use recording is done by individuals or families in the privacy of their own home for use in their home.

(2) The material copied has been voluntarily sold by the authors for broadcast over the public airwaves to private homes free of charge.

These distinctions narrow the issue before this court. They shape the four factors of the traditional fair use analysis and guide the court in defining appropriate expectations of the copyright holder and the public.

As discussed above, the traditional four factors in determining fair use are listed in § 107 without reference to weight or priority. Several commentators, however, have suggested that fair use cases show that the fourth factor of harm to the copyrighted work is or should be considered first when determining fair use,[3] and the issue of harm has

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[3]*See, e. g.*, 3 *Nimmer on Copyright* § 13.05[A][4]; Seltzer, *Exemptions and Fair Use*, *supra*, at 36; Freid, *Fair Use and the New Act*, 22 N.Y.L.S. Rev. 497 (1976-1977); and Comment, *Betamax and Infringement of Television Copyright*, 1977 Duke L.J. 1181, 1209.

received the most emphasis in this lawsuit. For these reasons, it is discussed first in this analysis of fair use.

1. *Harm*

The Court of Claims in *Williams & Wilkins* found that library photocopying was fair use because ". . . plaintiff has failed to prove its assumption of economic detriment, in the past or potentially for the future. . . . This record simply does not show a serious adverse impact, either on plaintiff or on the owner's potential market for the work. 487 F.2d at 1359. This approach by the Court of Claims has been widely criticized as inappropriate for determining fair use. One of the most forceful criticisms is from Professor Melvill Nimmer, who writes that the court confused the issue of harm for purposes of damages with the harm concept in fair use. According to Nimmer, the court should have asked "not whether the particular photocopying activities of the defendant resulted in damages to the plaintiff, but rather whether wholesale photocopying of plaintiffs' journals by any and all libraries and similar institutions would decimate the plaintiffs' potential market." Nimmer, *Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland*, 22 U.C.L.A. L. Rev. 1052, 1054 (1975).

As in *Williams & Wilkins, supra*, the issue of harm is important in this lawsuit for three determinations: (1) whether the use is fair use, (2) whether an injunction is appropriate, and (3) assuming infringement, what the damages are. Actual harm may not be essential to any of these three determinations. Without it however, the determinations are much more difficult. It has been suggested that for purposes of fair use, the question should not be what are the past effects but rather what are the probable effects. Freid, *Fair Use and the New Act, supra*, at 505 n. 39. As to the injunction issue, the question is whether any irre-

parable harm will occur if an injunction is not issued. As will be discussed, this prognostication of irreparable injury is particularly difficult for a court to make when no harm has occurred to date and predictions of future harm are based on personal belief and speculation. The only issue where actual harm is neither necessary nor particularly helpful, is the issue of damages. Under both the Old and the New Acts, once infringement is found, statutory damages can be awarded when no actual damages have been proven.

Plaintiffs have admitted that no actual harm to their copyrights has occurred to date. Plaintiffs' experts also admitted that they knew neither the year in which the predicted harm would occur nor the number of Betamax purchases which would cause the harm. Yet they vigorously maintained throughout trial that harm to their copyrights would not only be a probable effect of Betamax usage, but an imminent effect.

The bases for this contention are discussed extensively below in the context of the injunction issue and will not be repeated here. It should be noted, however, that plaintiffs' argument is more complicated and speculative than was the plaintiff's in *Williams & Wilkins*. In *Williams & Wilkins*, the plaintiff asked the court to predict that if many readers obtained a journal article free of charge from the library, the readers would not subscribe to the journal and the plaintiff would be injured. Here, plaintiffs ask the court to find harm based on many more assumptions. Plaintiffs first assume that a large proportion of the 75 million television households in this country will in the near future own the Betamax machine which today costs approximately $875; then they assume that a significantly large number of these Betamax owners will have both the financial ability and the desire to buy many Betamax tapes (today costing approximately $20 each) to record movies and episodes from TV

series, and that they will keep these tapes for repeat viewing over many years. They further assume that a viewer will watch these Betamax playbacks at a time when he would otherwise be watching live television. Plaintiffs also assume that even if the tapes were not kept over a long period of time, Betamax owners will still injure the value of their copyrights by deleting commercials from movies and television series. Furthermore, plaintiffs assume that because the Betamax allows more persons to view the original telecast, fewer persons will be in the rerun audience. As is discussed more fully in Part IV *infra*, some of these assumptions are based on neither fact nor experience, and plaintiffs admit that they are to some extent inconsistent and illogical. They surface from a system of marketing which developed because producers and broadcasters could control the time at which the public views materials beamed to them over public airwaves. The Betamax reduces that control, and plaintiffs predict that harm will result.

Because this prediction of harm is based on so many assumptions and on a system of marketing which is rapidly changing, this court is hesitant to identify "probable effects" of home-use copying. Yet even if this factor of the fair use analysis were determined in plaintiffs' favor, it would not render the use unfair. The other three factors, and other considerations which the court finds relevant, must be balanced with the harm.

Before proceeding to a discussion of these factors, the court notes that the extent of the harm which plaintiffs ask the court to assume is probable is unclear. Harm which "imperils the existence of a publication" is more destructive of a fair use defense than is harm which would "limit profits." *See* Freid, *Fair Use and the New Act*, *supra*, at 509 n. 53. Plaintiffs' experts have testified that if Betamax is not enjoined, their profits will decrease, and that for some

programs, they may not recoup their production costs. If this happens, plaintiffs warn, they will have to reduce the quality, or at least the production costs, of their audiovisual works. Plaintiffs have not said that they will no longer be able to produce this material. Indeed it would be difficult for these plaintiffs to so contend. Their profits have increased yearly, including the years in which VTR technology was introduced and growing. They exploit their material in many ways other than free television. Networks pay them substantial sums of money for their product before it even reaches the television viewer who copies it. Of course, plaintiffs claim that this copying indirectly reduces the revenue by affecting ratings and advertising. If this is true, plaintiffs have marketing alternatives at hand to recoup some of that predicted loss. They stand ready to make their product available in cassettes and compete with the VTR industry. They have proven resilient to change in market practices arising from other technological inventions, *e. g.*, cable television, pay television.

It is true, however, that copyright holders in the television industry have come to expect substantial financial reward. They are entitled to reap the highest profit they can within the industry. The Betamax and other technological advances will undoubtedly change the industry and introduce new considerations into plaintiffs' marketing considerations.

Copyright law, however, does not protect authors from change or new considerations in the marketing of their products. As the Supreme Court stated in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*: "While securing compensation to the holders of copyright was an essential purpose of that Act, freezing existing economic arrangements for doing so was not." 415 U.S. 394, 414 n. 15, 94

S.Ct. 1129, 1140, 39 L.Ed.2d 415 (1974). In any event, any harm which might be possible must be weighed with other fair use factors.

2. *Nature of the Material*

This factor has not been discussed extensively in fair use cases. In *Rosemont Enterprises, Inc., supra,* at 307, the court asked whether the nature was such that "distribution would serve the public interest in the free dissemination of information." In *Williams & Wilkins, supra,* at 1356, the court found that the materials were necessary to the development of medical science. The Senate Report accompanying the New Act, S.Rep.No.473, *supra,* suggests that the use of a news article would be judged differently from the use of a musical composition and that reproduction of material which is usually unavailable would be more justifiable than reproduction of readily available material.

The material at the heart of this lawsuit cannot be categorized as "scientific" or "educational." This court cannot, nor would it desire to, pronounce the "New Mickey Mouse Club" episode which the court viewed at trial to be "mere entertainment," or "educational," or "informational," or "beneficial." As the Supreme Court wrote in *Stanley v. Georgia,* 394 U.S. 557, 566, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542 (1969), "The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all."

Inability to draw these lines does not leave this court without guidance on this factor, however. The most important aspect of the "nature" of the materials involved here is one that courts examining fair use in other media have not had to confront. This case involves only that copyrighted material which plaintiffs voluntarily choose to have

telecast over public airwaves to individual homes free of charge. Plaintiffs are not paid for this material by the viewers. While the audience does not pay directly for the programs, however, this telecast is not a gratuity from the plaintiffs. They are paid for the program by the broadcaster at a rate sometimes below production costs and sometimes above. As the Supreme Court discussed in *Teleprompter, supra,* the payment process distinguishes the copyright owner in the television industry from most others:

> Unlike propagators of other copyrighted material, such as those who sell books, perform live dramatic productions, or project motion pictures to live audiences, holders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material—that is, the television viewers—but by advertisers who use the drawing power of the copyrighted material to promote their goods and services. Such advertisers typically pay the broadcasters a fee for each transmission of an advertisement based on an estimate of the expected number and characteristics of the viewers who will watch the program. While, as members of the general public, the viewers indirectly pay for the privilege of viewing copyrighted material through increased prices for the goods and services of the advertisers, they are not involved in a direct economic relationship with the copyright holders or their licensees.

415 U.S. at 411-12, 94 S.Ct. at 1139-40 (footnote omitted).

The direct payment from broadcasters and advertisers has made the "free" offering to the public very profitable for plaintiffs. The opportunity to use the public airwaves allows plaintiffs to disseminate their works more widely than they ever could on their own.

This characteristic of the material is significant because of its interaction with the issue of harm. Because plaintiffs

derive their revenues only indirectly from the alleged infringers of their work, the harm resulting from the infringement is more speculative. This has been discussed briefly above and will be addressed more extensively in Part IV.

3. *Purpose of Use*

Courts have traditionally applied this factor by asking whether the copyrighted material is used for criticism, research or other independent work. *See, e. g., Robert Stigwood Group, Ltd. v. O'Reilly*, 346 F.Supp. 376, 384 (D.Conn.1972), *rev'd on other grounds*, 530 F.2d 1096 (2d Cir. 1976); *Loew's Incorporated v. Columbia Broadcasting System*, 131 F.Supp. 165, 175 (S.D.Cal.1955), *aff'd sub nom., Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43, 78 S.Ct. 667, 2 L.Ed.2d 583 (1956). Plaintiffs contend that in this case there is no independent use. Betamax owners use the copy for the same purpose as the original. They add nothing of their own.

While this is true, application of this factor is not so limited. Section 106 of the New Act does not require this line of interpretation. Congress did not require independent use when finding home use sound recording to be fair use.

The salient characteristics of the use here are that it is noncommercial and in the home. Plaintiffs correctly point out that noncommercial use does not mean fair use. This is true, just as commercial use does not automatically bar fair use. *Meeropol v. Nizer, supra*, at 1069, *Rosemont Enterprises, Inc. v. Random House, Inc., supra*, at 307. The noncommercial nature of the use here, however, does broaden the scope of the doctrine. *Loew's Incorporated v. Columbia Broadcasting System, supra*, 131 F.Supp. at 175.

Here, the use is not only noncommercial but also private. This lawsuit concerns individuals in their homes copying

material to view at a later time in their homes. At issue is not whether they can take the copy to the church or school and show it to a larger group. What this court rules on is home noncommercial use.

The purpose of this use is to increase access to the material plaintiffs choose to broadcast. This increase in access is consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973). This access is not just a matter of convenience, as plaintiffs have suggested. Access has been limited not simply by inconvenience but by the basic need to work. Access to the better program has also been limited by the competitive practice of counterprogramming.

Betamax owners use plaintiffs' works noncommercially and privately. This use increases the owners' access to material voluntarily broadcast to them free of charge over public airwaves. Because the use occurs within private homes, enforcement of a prohibition would be highly intrusive and practically impossible. Such intrusion is particularly unwarranted when plaintiffs themselves choose to beam their programs into these homes.

4. *Substantiality*

The fourth traditional fair use factor is the "substantiality" of the use. Generally, the more substantial the taking from the copyrighted work, the less likely it is that the fair use defense will be available. Like the other variables in the fair use analysis, the substantiality factor is inextricably bound with the issue of harm. Obviously, in the normal case of copying, the effect that the infringing copy has on the market for the original will depend to a large extent on

whether the copy can substitute for the original. As Professor Nimmer has written:

> [I]ncorporating substantially all of a short story in what purports to be a literary criticism of the story will serve to fulfill the needs of those who wish to read the story as well as those who merely wish to study the reviewer's criticism. The same result is not as clear, but arguably pertains in the *Gaslight* case [*Benny v. Loew's, Inc., supra*, discussed *infra*.] That is, those who saw the Jack Benny burlesque not only enjoyed his parody, but also became rather fully familiar with the serious underlying story so that they might not thereafter wish to see the plaintiff's original work.

3 *Nimmer on Copyright* § 13.05[D].

Home use recording off-the-air usually involves copying the entire work. This fact, however, does not defeat the defense of fair use, because all factors must be taken together.[4] When considered with the nature of the material and the noncommercial private use, this taking of the whole still constitutes fair use, because there is no accompanying reduction in the market for "plaintiff's original work."

Plaintiffs contend that the fair use defense is barred in this case by the substantiality factor. They rely on *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir.

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[4]As one commentator has concluded:

> Too rigid an application of the substantiality criterion . . . would severely limit dissemination of copyrighted works by new technologies. . . . Indeed, to aid research and education, certain applications of these technologies have been statutorily recognized as fair use. [*See* 17 U.S.C. § 108(a)].

Note, *Home Videorecording: Fair Use or Infringement?*, 52 S.Calif.L.Rev. 573, 608 (1979) (citations omitted).

Of course, the spread of new technologies poses significant risks for copyright owners, and wholesale reproduction will, in many instances, limit the market for the original work. 3 *Nimmer on Copyright* § 13.05[E]. When that is the case, substantiality of the taking will combine with harm to preclude a fair use defense.

1978), *cert. denied*, 439 U.S. 1132, 99 S.Ct. 1054, 59 L.Ed.2d 94 (1979), where the court found that the defendants' admitted copying of Disney cartoon characters for use in adult comic books constituted infringement, and on *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966); and *Benny v. Loew's Inc.*, *supra*. It is true that, taken out of context, dicta in *Meeropol* and *Rosemont* appear to preclude resort to a fair use defense when copying is nearly verbatim, but the context of the dicta reveals that the Second Circuit was concerned about substantiality only when it produced harm to the complaining party.

The *Air Pirates* case was a parody case and discussed fair use standards for parodies which, "like the standards for applying fair use in other contexts, have been a source of considerable attention and dispute." 581 F.2d at 756. Specifically, the court reviewed the substantiality test used in *Benny v. Loew's Inc.*, *supra*, another parody case in which Jack Benny's television parody of Metro-Goldwyn-Mayer's "Gas Light" was held to be an infringement. The court interpreted the *Benny* case as establishing a threshold substantiality test for the fair use defense in a parody case, then applied this threshold test to the parody before them and affirmed the district court's summary judgment of infringement.[5]

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[5]The court observed:

> The language in *Benny* concerning the substantiality of copying can be given a reading much more in keeping with the context of that case and the established principles at the time of that case if the opinion is understood as setting a threshold that eliminates from the fair use defense copying that is virtually complete or almost verbatim. *Accord*, 2 *Nimmer on Copyright* § 145. It was an established principle at the time of *Benny* that such verbatim copying precluded resort to the fair use defense. *See, e. g., Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937).

Walt Disney v. Air Pirates, *supra*, at 756 (footnote omitted). (*Leon*,

In addition to *Benny*, the *Air Pirates* court cites *Walt Disney Productions v. Mature Pictures Corp.*, 389 F.Supp. 1397 (S.D.N.Y.1975), and *Berlin v. E. C. Publications*, 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33 (1964), as support for the threshold substantiality test. Both of these are parody cases. The court also cites *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937). *Leon* was not a parody case, but it discussed the substantiality issue only as to copying *and publication* of copyrighted material:

> It is not necessary in the case before us to discuss generally the question of what constitutes "fair use." Obviously, every publication copyrighted admits of many uses which do not constitute infringement. Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use.

91 F.2d at 486.

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as noted *infra* in the text of this opinion, is distinguishable from the case before this court because it involved commercial distribution of the infringing materials.

The *Air Pirates* court concluded its discussion of the substantiality factor as follows:

> Thus *Benny* should stand only as a threshold test that eliminates near-verbatim copying. In the absence of near-verbatim copying, other courts have analyzed the substantiality of copying by a parodist by asking whether the parodist has appropriated a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire. *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), certiorari denied, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33; see *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F.Supp. 348 (S.D.Cal.1955).[13]

[13]In so construing *Benny*, we necessarily disagree with its dictum that a parody is treated no differently than any other taking. See *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), certiorari denied, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33.

Walt Disney v. Air Pirates, supra, at 757; 757 n. 13.

The present proceeding is not a parody case, and, since there has been no distribution, there has been no publication. 17 U.S.C. § 101. The underlying rationale for the threshold substantiality test as discussed in the above cases is, therefore, not applicable here. The issue before this court is not what degree of copying is necessary to "recall or conjure up" the object of a satire as it was in *Air Pirates*. Nor is the issue whether "wholesale copying and publication" is one of the "many uses [of copyrighted works] which do not constitute infringement." *Leon, supra*, 91 F.2d at 486.

Section 107 of the New Act states that in determining whether the use made of a work in any particular case is a fair use, the factors considered shall include the traditional four. Substantiality is simply listed as one of these factors; it is given no special position in relation to the others. In codifying the fair use doctrine, Congress recognized that there are no simple rules which can be applied as to all cases. As H.Rep.No.1476, *supra*, at 5679, stated:

> Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.

In the unique factual context of this case, the guidance offered in § 107 is followed: all four factors are considered, as well as other criteria relevant to balancing the equities between the parties, and no element is given preclusive effect.

5. *Additional Considerations*

This case, which arises from a new technology, is one of first impression. No earlier copyright case addresses the issues raised here. The traditional four factors have not been applied to this type of fact situation.

Congress expressly left the fair use doctrine flexible because it recognized the possibility of such a situation. The doctrine is particularly useful in evaluating new technology and its effect on copyright law. As the House and Senate Reports quoted above note, the doctrine is especially important "during a period of rapid technological change," and "the courts must be free to adapt the doctrine to particular situations on a case by case basis."

Accordingly, this court finds that the home-use copying made possible by this new technology constitutes fair use of plaintiffs' works. The use, limited to home recording and playback of audiovisual material broadcast free of charge to Betamax owners over public airwaves, is noncommercial and does not reduce the market for plaintiffs' works.

II. *RECORDING BY RETAIL DEFENDANTS*

The central focus of this lawsuit has been home-use recording. Plaintiffs also contend, however, that retail stores infringe copyrights (1) when they record segments of plaintiffs' shows off-the-air, and (2) when they play these recordings back for the purpose of demonstrating the Betamax to potential purchasers. Specifically, plaintiffs alleged that defendants Carter Hawley, Federated/Bullock's, Associated/Robinson's and Henry's Camera have infringed certain copyrights.

The facts supporting these allegations are weak. As discussed *supra*, all copying by the retail defendants was made at the request of Paul Ruid, a private investigator retained by plaintiffs' law firm. While Ruid did not request a specific program for taping or a specific length of recording, he did pose as a potential customer and request a demonstration of Betamax capabilities. At best the evidence shows that in response to this request, Broadway copied an 8-minute segment of "Adam 12" (Universal) and a 15-minute seg-

ment of "Major Adams" (Universal) episode, and that Associated/Robinson's made two 8-minute recordings of the "Gemini Man" (Universal). It was not established at trial that Bullock's had succeeded in making any recording (Ruid never saw a playback of the alleged recording from "Captains and the Kings") and there was no testimony about recording by Henry's Camera.

The retail stores defend their actions on two grounds: (1) any infringement which may have occurred was induced and encouraged by plaintiffs, and, therefore, principles of equity bar suit on these actions; and (2) such copying is fair use.

Plaintiffs' claims against retail stores for their demonstrations are novel. There is no precedent for suing retail stores for displaying public televisions tuned to copyrighted programs, and plaintiffs do not complain here about this aspect of the retail defendants' activity.

Without deciding whether Ruid sufficiently "encouraged" activity so as to bar this suit, this court finds there has been no infringement. The retail stores' use of plaintiff Universal's product as presented in this suit is fair use.

Universal admits that no harm has resulted from the retail defendants' copying and playback of Universal products. Furthermore, Universal does not predict any future harm from the copying itself. The underlying concern is not about the copying by the stores but rather about the sales of Betamax. Universal sues the retail defendants because it believes that the stores are liable for contributory infringement by virtue of the subsequent sale of the machine. As Sidney Sheinberg, president and chief operating officer of MCA, testified, Universal would not bring the retail defendants into court to challenge the demonstration copying if there were no sales.

Demonstration copying and playback do not compete in any way with plaintiffs' products. The stores do not record and play back entire shows. The testimony does not show any librarying by the retail stores or any intent to use or profit from the copyrighted works. The only intent is to demonstrate the machine. For these reasons, the court finds that the demonstration copying of these retail defendants is fair use.

This cause of action against the retail stores is without precedent. There has been no suit to challenge photocopying to demonstrate a photocopier; playing a record to demonstrate a stereo system; or recording off a radio to demonstrate a recorder. The only damage claimed by Universal is that the demonstrations give an "imprimatur of acceptance" to copying off-the-air. As already discussed, this court finds that home-use copying is acceptable. In any event, this imprimatur is insufficient to render the retail defendants' demonstration use unfair.

Plaintiffs' claim that the sale of the machines constitutes contributory infringement is discussed below.

III. *LIABILITY OF THE CORPORATE DEFENDANTS*

Even if this court were to hold that home-use copying is an infringement under the Old and New Acts and is not fair use, the court could not find defendants Sonam, Sony, DDBI and the retail stores liable for this infringement. Plaintiffs contend that these defendants are liable under any of three theories: (a) direct infringement, (b) contributory infringement and (c) vicarious liability. This court cannot find any of the corporate defendants liable on any of these theories.

A. *Direct Infringement*

Plaintiffs contend that Sony and Sonam are liable as direct infringers for the copying done by Betamax owners because they furnished the instrumentality for the allegedly infring-

ing activity and they knew and expected that the major use of Betamax would be to record copyrighted material off-the-air, including motion pictures owned by Universal and Disney. To support this contention, plaintiffs cite deposition testimony from Sonam executives and DDBI memos and advertisements which plaintiffs claim show expectation and encouragement of the recording of copyrighted material. Plaintiffs emphasize that DDBI knew of this potential copyright infringement and successfully sought from Sony and indemnity agreement.

To support a finding of direct infringement from this evidence, plaintiffs cite *Kalem Co. v. Harper Brothers*, 222 U.S. 55, 32 S.Ct. 20, 56 L.Ed. 92 (1911); *Elektra Records Co. v. Gem Electronic Distributors, Inc.*, 360 F.Supp. 821 (E.D.N.Y.1973) and *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947). While the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn, it appears from the courts' discussions of direct infringement in these three cases that plaintiffs' evidence here does not prove direct infringement. The involvement of the defendants in the infringing activity discussed in these cases was much more substantial and direct than that alleged against defendants here.

It is true that one can be found to have infringed directly even without participating in the actual infringing activity. In *Kalem*, a film producer was found liable for infringement through public exhibition of a film even though third persons had actually exhibited the film. There, however, the defendant-producer had not only advertised that the film could be used for public exhibition but had actually produced the infringing film, which contained scenes from the book "Ben Hur." The court found that public exhibition of this

film infringed the book's copyright, and the film producer was held liable.

Elektra, the most recent case relied on by plaintiffs, is completely distinguishable. Not only did it not involve home use recording, but it expressly distinguished such recording. Defendants operated a store where they (1) sold blank tapes; (2) maintained on their premises a coin-operated machine ("Make-A-Tape") which could duplicate onto blank tapes from prerecorded tapes; and (3) loaned purchasers of blank tapes prerecorded copyrighted works for duplication on the Make-A-Tape machine. There was even some suggestion at trial that the defendants directly assisted in the duplication.

The court found that defendants' Make-A-Tape operation "clearly evidences their commercial exploitation . . . for profit in derogation of plaintiffs' rights of exclusive publication." 360 F.Supp. at 823 (footnote omitted).

One of the defenses in *Elektra* was that the "individual and self-service nature" of Make-A-Tape duplication made it analogous to home recording for home use. The court expressly rejected this argument:

> That exception [home recording] does not cover situations where the copying is done for the "purpose of reproducing or otherwise capitalizing commercially on it." House Report No. 92-487, U.S.Code Cong. & Admin.News, *supra* at p. 1572. The facts of record here bespeak commercial exploitation and nothing else. In lending the copyrighted sound recording to the customer without charge, in selling the less costly blank tape from which the spurious but exact copy may be made, and in providing the equipment whereby it may be speedily done at minimal cost, defendants are engaging in mass piracy on a custom basis. To view this activity as a form of "home recording" would stretch

> imagination to the snapping point. To refuse to protect plaintiffs' exclusive reproduction and publication rights in such circumstances would defeat the very purpose of the sound recording amendment and nullify the intent of Congress.

360 F.Supp. at 824-25.

This statement by the *Elektra* court highlights why the case has little precedential value for this decision. Defendants Sony and Sonam manufacture and market the Betamax and blank tapes. They do not, however, loan or otherwise provide the copyrighted work. Rather, copyright owners sell their works for broadcast to the public free of charge over public airwaves. The copying occurs not in a store operated and managed by the defendants but rather in a person's home, a location in which individual privacy is constitutionally protected and over which defendants have no control. Furthermore, defendants' acts of selling the Betamax and blank tapes to consumers can easily lead to noninfringing uses. In *Elektra*, the intent to infringe was clear: the prerecorded tapes were momentarily loaned to purchasers of blank tapes specifically for use in the store on the Make-A-Tape machine.

The videotape recorder, like a tape recorder, is a staple item of commerce. Its uses are varied. As Justice Holmes recognized in *Kalem*, "[i]n some cases where an ordinary article of commerce is sold nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer." 222 U.S. at 62, 32 S.Ct. at 21. Nice questions do arise here. Defendants have provided the public with a machine capable of recording off-the-air. In *Kalem*, manufacturers of the film and the camera used to make the infringing dramatization of "Ben Hur" were not sued; nor was the manufacturer of the Make-A-Tape machine in *Elektra*. There is no precedent for find-

ing the corporate defendants here liable for direct infringement.

The *Harold Lloyd* case relied on by plaintiffs primarily discusses contributory infringement, not direct infringement, and is addressed below.

B. *Contributory Infringement*

The Second Circuit has offered the most clear definition of contributory infringement:

> [O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a "contributory" infringer.

Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted).

Plaintiffs rely on the same factual allegations discussed above to support a finding of contributory infringement: the manufacture, advertising, demonstration and sale of Betamax causes, induces or, at the very least, encourages, furthers or materially contributes to the unauthorized recording of copyrighted motion pictures. According to plaintiffs, that is the primary use for which Betamax is designed and marketed and which defendants encourage in their ads and brochures. In addition, plaintiffs' witnesses testified at trial that while off-the-air recording was possible with machines available prior to Betamax, Betamax was the first compact, affordable consumer item.

In rebutting allegations of contributory infringement, defendants repeat their argument that a manufacturer of a staple article of commerce cannot be held liable for infringement by purchasers of that product. As to the advertising, defendants correctly note that there was no evidence at trial that any advertisements or other statements by defendants in any

way induced or caused to be made any of the copies at issue. As to the retail defendants, Henry's Camera was the only one that sold a Betamax to any of the owners discussed in this suit. Henry's Camera sold a 7200 to William Griffith's sons. Griffith testified, however, that he never talked to anyone at Henry's Camera about the Betamax in any respect.

Defendants further contend that the essential element of "knowledge of the infringing activity" is missing. Plaintiffs assert that, while defendants may not have known that specific titles were being copied or that this would be illegal, they did know that the main use of the Betamax would be to record copyrighted works off-the-air and that such recording is a copyright infringement. Plaintiffs cite deposition testimony of Sony executives to support this finding of knowledge. Defendants respond that the opinions expressed in these depositions were ones held prior to 1975. These opinions changed and Sony did not place a warning plate on the back of the Betamax as it had done with earlier VTRs and did not include a warning in Betamax advertisements. Furthermore, they cite the 1977 opinion of this court that "to say that use either is or is not illegal is simply not yet true." *Universal City Studios v. Sony Corp. of America*, 429 F.Supp. 407, 410 (C.D.Cal. 1977).

This court agrees with defendants that their knowledge was insufficient to make them contributory infringers. In the contributory infringement cases cited by plaintiffs, the requisite knowledge is greater than that possessed by the corporate defendants here.

In the *Gershwin* case, *supra*, the court found a concert artists' managing company to be a contributory infringer because the management company knew that the artists were performing copyrighted works and would not secure a

copyright license, and yet it helped to form and direct an artists' association and create an audience for them.

In discussing contributory infringement, the *Gershwin* court cited *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.* 256 F.Supp. 399 (S.D.N.Y.1966) ("Screen Gems I"). There the court focused on the manufacture and sale of records which reproduced musical compositions without compliance with the statutory compulsory license provision. Plaintiffs—owners of the infringed copyrights—sued (1) the advertising agency which created ads for the records and purchased time from a radio station; (2) the owner and operator of the radio station; and (3) the agency which packaged and mailed the records. These defendants moved for summary judgment. The court denied this motion, finding that there were issues of fact as to whether each had either actual or constructive knowledge of the infringement and, if so, whether each could be "held liable as one who knowingly participated in or furthered the tortious conduct." 256 F.Supp. at 404 (footnote omitted).

Two of the defendants—the radio station and the packager—subsequently settled. The advertising agency went to trial. The court found that the work performed for the infringer by the advertising agency was "a participation in and a furtherance of their infringement of plaintiffs' copyrights" and then focused on whether the agency had engaged in this work with the knowledge that its clients were infringers. 327 F.Supp. 788, 791 (S.D.N.Y.1971) ("Screen Gems II"). The court found that the agency employee who handled the account was "a knowing party to the piracy. His knowledge binds his employer." 327 F.Supp. at 792.

In *Universal Pictures Co. v. Harold Lloyd Corp., supra,* the writer for an infringing motion picture photoplay was found to be a contributory infringer because he had selected

the material for the photoplay knowing that it had been used in another picture.

Here, no employee of Sony, Sonam or DDBI had either direct involvement with the allegedly infringing activity or direct contact with purchasers of Betamax who recorded copyrighted works off-the-air. Henry's Camera sold the Betamax to Griffiths' sons, but no testimony shows that the store or its employees knew that Griffiths would record copyrighted works.

Plaintiffs assert, however, that these defendants knew it was likely that people would use the Betamax to record copyrighted works and that this constitutes constructive knowledge. Even assuming that such probability were both accurate and sufficient to create "constructive knowledge" of the recording of copyrighted works, these defendants could not know that this was an infringing activity. Unlike the management agency which knew that the artists would not get a copyright license or the advertising agency whose employee knew that records were being made without paying a compulsory license fee, defendants here could not know what copyright law required. Before this lawsuit, that issue had not been determined. As discussed above, this court finds that home use recording is not an infringement. Even if this finding were incorrect, defendants could not be held responsible for knowing otherwise.

It is also doubtful that these defendants have met the other requirement for contributory infringement: inducement or material contribution to the infringing activity. Plaintiffs contend that Sony, Sonam, DDBI and Henry's Camera through advertising "induced" the infringing activities of recording copyrighted shows and librarying. As discussed above, Sony (through DDBI) and Henry's Camera did advertise the use of Betamax for recording favorite shows and compiling a library. Once again, however, there was no

evidence that any of the copies made by Griffiths or the other individual witnesses in this suit were influenced or encouraged by these advertisements.

Plaintiffs' claims are unprecedented. Unlike the defendant in *Gershwin*, defendants here do not arrange for and direct the programming for the infringing activity. Unlike the defendants in *Screen Gems I* and *II*, defendants here do not sell or advertise the infringing work. Plaintiffs sue defendants because they manufacture, distribute, advertise and sell a product capable of a variety of uses, some of them allegedly infringing.

Selling a staple article of commerce—*e. g.*, a typewriter, a recorder, a camera, a photocopying machine—technically contributes to any infringing use subsequently made thereof, but this kind of "contribution," if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management.

In patent law, manufacturers, distributors, retailers and advertisers of staple articles of commerce suitable for substantial noninfringing use cannot be held liable as contributory infringers. *See* 35 U.S.C. § 271(c); *Aro Manufacturing Co. v. Convertible Top Co.*, 377 U.S. 476, 488-89, 84 S.Ct. 1526, 12 L.Ed.2d 457 (1964); *Henry v. A. B. Dick Co.*, 224 U.S. 1, 48, 32 S.Ct. 364, 56 L.Ed. 645 (1912). As the Court in *Henry* noted, to hold otherwise would "block the wheels of commerce." *Id.*

Whether or not patent law has precedential value for copyright law and the Betamax is capable of "substantial" noninfringing use, the underlying rationale for the patent rule is significant. Commerce would indeed be hampered if manufacturers of staple items were held liable as contributory infringers whenever they "constructively" knew

that some purchasers on some occasions would use their product for a purpose which a court later deemed, as a matter of first impression, to be an infringement.

C. *Vicarious Liability*

Screen Gems I, supra, and *Gershwin* discussed vicarious liability as well as contributory infringement. As the *Gershwin* court noted, the roots of vicarious liability lie in the doctrine of *respondeat superior:* an employer is liable for the actions of his agent. Vicarious liability for copyright infringement is not dependent on an employer-employee relationship. Vicarious liability can be imposed when a party has the "right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Gershwin,* 443 F.2d at 1162. *Accord, Screen Gems I,* 256 F.Supp. at 402. Here defendants have neither the right nor the ability to control Betamax purchasers' use of the machines in their homes, and any financial benefit is derived from use of the machine whether or not this use is infringing.

In *Gershwin,* the court found that while the management company had no formal power to police the artists' association, it participated pervasively in the direction of the association and its programming, and the association depended on it for direction "in matters such as this." 443 F.2d at 1163. With these facts, the court found that the management company was in a position to police the artists.

In *Shapiro, Bernstein & Co. v. H. L. Green Co.,* 316 F.2d 304 (2d Cir. 1963), the court never used the term "vicarious liability" but did discuss *respondeat superior* in the context of copyright infringement. Drawing an analogy to cases where a dance hall's management was found liable for infringing music performed by the bands it hired, the court found that a chain store owner was liable for the sale of infringing record albums by a concessionaire within

its store. There the store owner retained the ultimate right of supervision over the record concession and took a proportionate share of the sale of the infringing records.

In *Chess Music, Inc. v. Sipe*, 442 F.Supp. 1184 (D.Minn. 1977), a tavern owner was found vicariously liable for the infringing performances of the live bands he hired. The court held that the owner "is deemed to have acquiesced in the musicians' performance as he allowed the musicians the discretion to select the performance." 442 F.Supp. at 1185.

Plaintiffs contend that defendants have similar power to supervise home recording of copyrighted works. They suggest that defendants could develop a jamming system to prevent recording of anything copyrighted. Whether or not such jamming is technologically feasible, this "supervision" would not be within the power of these defendants. A jamming system would most likely require the cooperation of many others: broadcasters, producers and perhaps the Federal Communications Commission.

Plaintiffs also assert that defendants could remove the tuner from the Betamax and thereby make it impossible to record off-the-air. Even if defendants were required to do this, however, an outboard tuner could be purchased separately.

The most effective way for defendants to control the recording of copyrighted audiovisual work is to stop selling the Betamax. Plaintiffs, however, have cited no case in which a defendant's "power to supervise" was based on his ability to terminate the business.

The second requirement, financial benefit, may also be absent here. In *Shapiro* and *Screen Gems I* and *II*, the infringing records benefited the defendants directly; they received a share of the revenue from the sales. In *Gershwin*,

the management company received a fee for its assistance in programming and arranging the artists' performances. Here, defendants do not profit from the infringing activity directly. They receive financial benefit from the sale of tapes, regardless of their subsequent use. They benefit directly from the allegedly infringing use only if they sell more because that use is available.

Plaintiffs urge expansive interpretations of the vicarious liability requirements. They contend that Sony has power to supervise because it could refuse to sell the Betamax and that Sony benefits financially from the infringement because some persons would not buy the Betamax if they could not record copyrighted works. With these interpretations, plaintiffs expand the doctrine beyond precedent and, potentially, bring many manufacturers, advertisers and retailers into the net of vicarious liability. For example, manufacturers of cameras could supervise infringers by not selling cameras; and they benefit financially from the sale of the camera to the infringers. Manufacturers of photocopying machines could supervise infringers by not selling photocopiers; and they benefit from the sale of the machine to the infringers. Vicarious liability has not been extended so far, and the facts of this case do not merit such an extension.

In addressing the issue of liability for performance of copyrighted works, H.R.Rep.No.1476, *supra*, set the following standard:

> To be held a related or vicarious infringer in the case of performing rights, a defendant must either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commercial gain from the operation and either direct or indirect benefit from the infringing performance.

H.R.Rep.No.1476, *supra*, at 159-60; [1976] U.S.Code Cong. & Admin.News, pp. 5775-76.

While this section of the House Report addresses performances and not copying, it does suggest reasonable limitations for vicarious liability in general and aids this court in interpreting the performance cases (*Gershwin, Chess Music*) on which plaintiffs rely.

Defendants are outside both the scope of these limitations and all previous application of the doctrine of vicarious liability. Their participation in and benefit from home recording of copyrighted works would not be sufficient to make them vicariously liable if this activity, contrary to this court's finding in Part I, were deemed to be an infringement.

IV. *STATE CAUSES OF ACTION*

Plaintiffs contend that if home use copying is an infringement, all corporate defendants are liable for unfair competition and fraudulent business practices in violation of California Civil Code § 3369 and California Business and Professional Code § 17500. They maintain that the corporate defendants are liable because (a) their advertising of the Betamax unfairly misleads the public to believe that copying off-the-air is legal, and (b) the Betamax diverts viewers from watching plaintiffs' shows on live television and in movie theaters.

The cases on which plaintiffs rely do not support their cause of action against these defendants. In both *People v. Wahl*, 39 Cal.App.2d Supp. 771, 100 P.2d 550 (1940) and *Chern v. Bank of America*, 15 Cal.3d 866, 127 Cal.Rptr. 110, 544 P.2d 1310 (1976), the defendants misrepresented facts in their dealings with the public. Here, defendants' advertisements, even assuming that they gave the impression of legality, did not misrepresent any fact within the knowledge of the defendants. Before this lawsuit, it was not

fact that home-use copying of copyrighted works constituted infringement; of course, as discussed in Part I, it is still not fact.

Plaintiffs' second contention as to unfair competition also fails. By the time of trial, Betamax had caused no measurable decrease in the live television or movie audience for plaintiffs' works and, as discussed in Part IV, the evidence does not show a likelihood of such a decrease.

Plaintiffs also alleged that defendants have intentionally interfered with their contractual and advantageous business relationships with networks and independent television stations. Yet they admit that to date no contract has been breached and no damage has been suffered. The elements for interference with contractual relations have not been proven. *See Charles C. Chapman Building Co. v. California Mart*, 2 Cal.App.3d 846, 853, 82 Cal.Rptr. 830 (1969).

Plaintiffs have also not proven any interference with advantageous business relationships. Once again, they admitted at the time of trial that there had been no measurable loss of profits or damage suffered because of Betamax. "[I]t is essential to a cause of action for unlawful interference with business that it appeared that, except for the tortious interference of the defendant, there was a reasonable probability that plaintiff would have entered into a contract or would have made a profit." *Wilson v. Loew's, Inc.*, 142 Cal.App.2d 183, 192, 298 P.2d 152, 159 (1956).

Defendants contend that these state causes of action are preempted by federal copyright law. Since this court finds that no state cause of action has been proven, there is no ruling on the preemption issue.

V. *INJUNCTIVE RELIEF*

Plaintiffs seek injunctive relief. They ask the court to exercise its equitable powers to restrain defendants from manufacturing, distributing, selling or offering for sale Be-

tamax or Betamax tapes; from using Betamax or Betamax tapes to copy motion pictures owned and copyrighted by plaintiffs; from advertising that Betamax and Betamax tapes may be used for the purpose of making copies of television shows, including motion pictures owned and copyrighted by plaintiffs; and from exhibiting or playing all videotape copies made by defendants of motion pictures owned and copyrighted by plaintiffs. Plaintiffs have suggested alternatively that the court require Sony to modify the Betamax to render it incapable of recording copyrighted works off the air.

An injunction is an equitable remedy. Its issuance is a matter of court discretion. As the Court recognized in *Hecht v. Bowles*, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944), "We are dealing here with the requirements of equity practice with a background of several hundred years of history. . . . The historic injunctive process was designed to deter, not to punish." 321 U.S. at 329, 64 S.Ct. at 591-92.

There are no rigid rules to instruct courts when to issue injunctions. An injunction is never a matter of absolute right. As the Supreme Court recently stated in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193, 98 S.Ct. 2279, 2301, 57 L.Ed.2d 117 (1978):

> It is correct, of course, that a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law. . . . As a general matter it may be said that "[s]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor's discretion." D. Dobbs, Remedies 52 (1975).

An injunction is a harsh and drastic remedy. *Kass v. Arden-Mayfair, Inc.*, 431 F.Supp. 1037 (C.D.Cal.1977). Courts have recognized:

> There is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction . . . . The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well established principles for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it.

Detroit Newspaper Publishers Association v. Detroit Typographical Union No. 18, International Typographical Union, 471 F.2d 872, 876 (6th Cir. 1972), *quoting* 3 Barron & Holtzoff, *Federal Practice and Procedure* (Wright Ed.) § 1431.

This is a doubtful case. An injunction would deprive the public of a new technology capable of noninfringing uses (see *infra*). Furthermore, the need for an injunction is not clear.

Courts look for irreparable harm to the plaintiff before issuing injunctive relief, and here plaintiffs' fears of irreparable harm are speculative at best. Plaintiffs contend that if the court finds that copyright infringement has occurred, irreparable harm is presumed, and it becomes defendants' burden to prove that further harm will not occur in the future.

The bulk of this opinion has been addressed to this court's reasons for finding that home-use copying does not consti-

tute infringement. Even if the court had concluded otherwise, however, it would not find an injunction appropriate.

It is true that courts have acknowledged that actual harm from copyright infringement is very difficult to prove, and, "in the ordinary case," irreparable harm is presumed when the copyright holder's "right to the exclusive use of the copyrighted material is invaded." *American Metropolitan Enterprises of New York, Inc. v. Warner Brothers Records, Inc.*, 389 F.2d 903, 905 (2d Cir. 1968). Plaintiffs claim that no court has ever refused to grant a permanent injunction in a copyright case when infringement has been proven, even when there has been no evidence of harm. Plaintiffs cite *Chappell & Co. v. Middletown Farmers Market & Auction Co.*, 334 F.2d 303 (3d Cir. 1964) (direct infringer permanently enjoined); *Big Sky Music v. Todd*, 388 F.Supp. 498 (S.D.Ga.1974) (injunction against owner and operator of nightclub for copyright infringement by live bands performing in the club); *Fisher-Price Toys, Division of Quaker Oats Co. v. My-Toy Co., Inc.*, 385 F.Supp. 218 (S.D.N.Y.1974) (direct infringer permanently enjoined); *Shapiro, Bernstein & Co., Inc. v. "Log Cabin Club Association,"* 365 F.Supp. 325, 328 (N.D.W.Va.1973) (injunction against president and manager of association for musical copyright infringements occurring in club operated by association); *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 188 F.Supp. 235, 238 (S.D.N.Y.1960) (direct infringer permanently enjoined); *Adviser's, Inc. v. Wiesen-Hart, Inc.*, 161 F.Supp. 831 (S.D.Ohio 1958) (direct infringer permanently enjoined) and *Gordon v. Weir*, 11 F.Supp. 117, 124 (E.D.Mich.1953), *aff'd*, 216 F.2d 508 (6th Cir. 1954) (direct infringer permanently enjoined).

This litigation, however, is not the "ordinary" copyright case where plaintiffs seek an injunction against the direct infringer or the person who controls the infringing activity.

Plaintiffs here ask the court to enjoin the manufacturer, distributors, retailers and advertiser of a machine used by persons in private homes for allegedly infringing activities. There is no precedent for plaintiffs' requested injunction.

No such injunction was granted in the cases cited by plaintiffs. Indeed, this court has found no case in which the manufacturers, distributors, retailers and advertisers of the instrument enabling the infringement were sued by the copyright holders. For example, in *Williams & Wilkins Co. v. United States, supra*, and *Wihtol v. Crow, supra*, plaintiffs did not make the manufacturer or seller of photocopy machines a defendant. In *Encyclopaedia Britannica Educational Corp. v. Crooks, supra*, the infringer was a school district that videotaped copyrighted programs, but the manufacturer of the tape recorders and the tape used in the infringement was not made a defendant. In *Elektra Records Co. v. Gem Electronic Distributors, Inc., supra*, the infringer owned retail stores which installed coin-operated tape recorders (Make-A-Tape) for customer use in duplicating prerecorded copyrighted tapes. The manufacturer of the recorders used in the infringement was not made a defendant. In *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., supra*, the infringer (Mark-Fi) was a manufacturer of bootleg phonograph records, but the manufacturer of the record pressing equipment used in the infringement was not made a defendant.

As noted above, an injunction is an equitable remedy. Plaintiffs' request for an injunction against the corporate defendants is unique, and the equitable considerations are different from those found in the typical copyright case. Because the defendant's role in the asserted infringement is indirect, and because defendant's product is also used for purposes where no infringement could be alleged (*e.g.*, recording material which is not copyrighted or where per-

mission to record is given), it is necessary to weigh the evidence of harm offered at trial. The court must consider this evidence in the context of the effect of an injunction in this case.

Plaintiffs predict a wide range of harmful effects from the various uses of Betamax. Some of these effects are immediate; others are delayed. Plaintiffs contend that each will result from one of the following uses of the Betamax machine:

1. Recording material off-the-air but never viewing the copy.

2. Time-Shifting: Recording off-the-air while not viewing the program, watching the copy within a short period of time and erasing it thereafter.

3. Librarying: Recording off-the-air and saving the tape for more than one subsequent viewing.

4. Avoiding commercials either by using the pause button while recording or by fast-forwarding while playing back.

Plaintiffs' prediction of harm from each of these uses assumes that the public will own and use a very large number of Betamax recorders. By the end of 1978, after four years of increasing sales of Betamax and several years of sales of its competitors, plaintiffs had experienced no harm. In addition to admitting that there has been no harm to date, plaintiffs admit they cannot predict at what date or level of sales the expected harms will occur. The growth of Betamax ownership will be affected by price. Today the machine costs approximately $875 with each tape costing approximately $20. The growth of ownership will also be influenced by competition from Universal's prerecorded discs and other prerecorded cassettes.

Each listed use is addressed below with plaintiffs' accompanying prediction of harm and the assumptions underlying that prediction.

A. *Recording But Never Viewing*

People may occasionally tape more material than they will watch. For example, defendant Griffiths testified that he recorded "Alpha Caper" but erased it before ever watching it.

Plaintiffs contend that even this recording merits concern as a *per se* violation of the copyright law. They do admit, however, that their copyright is not actually injured by this activity. Without this injury, this court will not issue an injunction against the corporate defendants based on this use.

B. *Time-Shifting*

At least two time-shifting situations were discussed at trial. First, a person may be at work at 4:30 p.m. and want to tape a program telecast then for his viewing later that evening. For example, Lowe testified that his son would record Mickey Mouse cartoons in the afternoons for both of them to watch that evening when Lowe returned home from work. Second, during sweep periods when counter-programming is most intense, a Betamax owner may want to record one network's program while watching another. For example, plaintiffs' witnesses testified about "Betamax Sunday," February 18, 1979. On that evening, one network broadcast "Gone With the Wind" against the other network's "One Flew Over the Cuckoo's Nest" against the other network's "Elvis." The public may well have wanted to see all three, but the networks forced a choice. Betamax increases the viewer's access from one to two programs.

Plaintiffs foresee many harms from time-shifting: (1) a decrease in the size of the live audience at the time of telecast; (2) a loss to live television or other plaintiff-sponsored entertainment at the time of viewing the copy; (3) a loss to the rerun audience; and (4) a loss to theater or film rental exhibition of the same program.

(1) Plaintiffs fear that persons "watching" the original telecast of a program will not be measured in the live audience and ratings and revenues will decrease. There was testimony at trial, however, that Nielsen Ratings has already developed the ability to measure when a Betamax in a sample home is recording the program. Thus, the Betamax owner will be measured as a part of the live audience. The later diary can augment that measurement with information about subsequent viewing.

(2) Plaintiffs predict that live television or movie audiences will decrease as more people watch Betamax tapes as an alternative. Here plaintiffs assume that people will view copies when they would otherwise be watching television or going to the movie theater. There is no factual basis for this assumption. It seems equally likely that Betamax owners will play their tapes when there is nothing on television they wish to see and no movie they want to attend. Defendants' survey does not show any negative effect of Betamax ownership on television viewing or theater attendance.

Plaintiffs rely on the concept that "viewing time is relatively inelastic," that persons will spend only so many hours watching any kind of television. Even if that is true, the time-shifting function may simply rearrange these hours. Instead of watching two hours each night of the week, the viewer may go bowling while recording his favorite Monday night program and watch it in addition to his regular two hours on Saturday.

Furthermore, this court cannot possibly enjoin fractionalization. There is no way, nor should there be, for plaintiffs to limit the availability of alternatives to television viewing. Games, books, movies—even people—all divert potential viewers from the television set. It is impossible for plaintiffs or this court to isolate the diversion of Betamax from that of these competitors.

(3) Plaintiffs fear that time-shifting will reduce audiences for telecast reruns. The underlying assumptions here are particularly difficult to accept. Plaintiffs explain that the Betamax increases access to the original televised material and that the more people there are in this original audience, the fewer people the rerun will attract. Yet current marketing practices, including the success of syndication, show just the opposite. Today, the larger the audience for the original telecast, the higher the price plaintiffs can demand from broadcasters for rerun rights. There is no survey within the knowledge of this court to show that the rerun audience is comprised of persons who have not seen the program. In any event, if ratings can reflect Betamax recording, original audiences may increase and, given current market practices, this should aid plaintiffs rather than harm them.

On cross-examination, Sidney Sheinberg acknowledged an inconsistency in this prediction of harm. He further explained:

> I think there is an inconsistency and I made that point in my deposition, I believe.
>
> But what we are concerned about, Mr. Dunlavey, is the perceptions of people and the perceptions of buyers.
>
> And there is also a nuance of distinction that is significant in the hearts and minds of people who deal, whether or not it is logically accurate, and that is between more people seeing something and the seeability being exhausted, as it were.

> Now the television industry works under the theory that the more people that see a program the more successful it is, the more people will want to see it in repeats and in syndication.
>
> That does not necessarily mean that they also don't work with the theory that the audience can be used up for a product.

(4) Plaintiffs suggest that theater or film rental exhibition of a program will suffer because of time-shift recording of that program. This suggestion lacks merit. By definition, time-shift recording entails viewing and erasing, so the program will no longer be on tape when the later theater run begins. Of course, plaintiffs may fear that the Betamax owners will keep the tapes long enough to satisfy all their interest in the program and will, therefore, not patronize later theater exhibitions. To the extent that this practice involves librarying, it is addressed in section V.C., *infra*. It should also be noted that there is no evidence to suggest that the public interest in later theatrical exhibitions of motion pictures will be reduced any more by Betamax recording than it already is by the television broadcast of the film.

Plaintiffs' experts admitted at several points in the trial that the time-shifting without librarying would result in "not a great deal of harm." Plaintiffs' greatest concern about time-shifting is with "a point of important philosophy that transcends even commercial judgment." They fear that with any Betamax usage, "invisible boundaries" are passed: "the copyright owner has lost control over his program."

These "nuances," "perceptions," and "points of philosophy" are understandable, though not always logical.

They do not, however, justify an injunction. Harm from time-shifting is speculative and, at best, minimal.

The audience benefits from the time-shifting capability have already been discussed. It is not implausible that benefits could also accrue to plaintiffs, broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts.

C. *Librarying*

Plaintiffs' fear of harm goes beyond time-shifting use. They also fear that persons will not erase the tapes after one viewing but rather will build a library, *i.e.*, maintain the tapes for subsequent repeat viewing. Plaintiffs argue that persons who record and watch playbacks are removed from audiences for live television and entertainment alternatives. This contention fails for the reasons discussed above. (See V.B.2.) Plaintiffs also argue that a Betamax owner who has a copy will not watch the same program when rerun on television or re-released for theater exhibition.

This prediction also assumes too much. First, it assumes that a large number of Betamax owners will have both the desire and the income to maintain a library. Each tape costs approximately $20. An extensive library will be very expensive, and it has not been proven that many persons will "library" to any significant extent. Additionally, prerecorded discs of special programs or movies will compete with the Betamax recording. These prerecorded discs arguably are more desirable than off-the-air recordings. They have not been edited for television, and they have no commercials. Plaintiff Universal has already released full versions of "Animal House" and "The Sting" for $15.95 each. There was testimony at trial that Twentieth Century-Fox has already released fifty titles for software to be used on home videotape recorders.

To the extent that librarying does occur, it is not clear that movie audiences will decrease. There is no survey or other evidence showing that persons who own a copy of a movie will not attend a theater exhibition of that movie. Theater-going is usually a social event which affords persons a larger viewing screen, better sound and an unedited version of the film. Even if theater audiences did decrease, this decrease would be offset by the corresponding increase in the audience for the original telecast of movies. When this increase is anticipated and measured, revenue from the initial sale to television should be greater.

D. *Avoiding Advertisements*

Plaintiffs have also speculated about the reaction of advertisers to Betamax. They predict that if Betamax owners use the pause control to delete commercials or the fast forward to pass them by, advertisers will pay less to networks and networks will pay less to producers and owners. It must be remembered, however, that to omit commercials, Betamax owners must view the program, including the commercials, while recording. To avoid commercials during playback, the viewer must fast-forward and, for the most part, guess as to when the commercial has passed. For most recordings, either practice may be too tedious. As defendants' survey showed, 92% of the programs were recorded with commercials and only 25% of the owners fast-forward through them. Advertisers will have to make the same kinds of judgments they do now about whether persons viewing televised programs actually watch the advertisements which interrupt them.

E. *Injunction Would Not Be An Appropriate Remedy*

The possibility that some of plaintiffs' suggested harms will occur is neither sufficiently certain nor adequately threatening to warrant an injunction against the corporate

defendants. Moreover, before issuing any injunction, a court must also consider the potential harm from the injunction itself. An injunction prohibiting the marketing of Betamax or requiring destruction of its off-the-air recording capability would deprive Sony of financial reward for years of investment and improvement of this technology. Even if it were deemed that home-use recording of copyrighted material constituted infringement, the Betamax could still legally be used to record noncopyrighted material or material whose owners consented to the copying. An injunction would deprive the public of the ability to use the Betamax for this noninfringing off-the-air recording.

Defendants introduced considerable testimony at trial about the potential for such copying of sports, religious, educational and other programming. This included testimony from representatives of the Offices of the Commissioners of the National Football, Basketball, Baseball and Hockey Leagues and Associations, the Executive Director of National Religious Broadcasters and various educational communications agencies. Plaintiffs attack the weight of the testimony offered and also contend that an injunction is warranted because infringing uses outweigh noninfringing uses.

Whatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law.

An injunction against the Betamax would be inefficient and unwise for other reasons. Its enforcement would be nearly impossible and in any event highly intrusive. The machines are in private homes. If defendants were ordered to recall these as plaintiffs request, this order would be

unenforceable without extensive inquiry into the activities of Betamax owners in their homes.

As discussed above, the court finds that home-use recording of broadcast material is not an infringement, and that if it were, the corporate defendants would not be found liable for the activity. Even if the court had found otherwise, however, an injunction would not be issued. No likelihood of harm was shown at trial, and plaintiffs admitted that there had been no actual harm to date. Thus there is insufficient evidence to support a finding of harm adequate to sustain the drastic remedy of injunction.

VI. *SUMMARY*

This lawsuit presents to the court only some of the issues raised by the videotape recorder technology. The court finds that home-use recording from free television is not a copyright infringement and that, even if it were, the corporate defendants are not liable and an injunction is not appropriate.

This litigation leaves many issues undecided. Like the court in *Williams & Wilkins, supra*, this court recognizes that the full resolution of these issues is

> preeminently a problem for Congress: . . . Obviously there is much to be said on all sides. The choices involve economic, social and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts, can and should fashion.

487 F.2d at 1360.

This court is bound by the factual context of this litigation. The facts do not show harm to plaintiffs even if infringing activity has occurred. Most of plaintiffs' predictions of harm hinge on speculation about audience viewing patterns and ratings, a measurement system which Sidney Sheinberg,

MCA's president, calls a "black art" because of the significant level of imprecision involved in the calculations. Testimony at trial suggested that Betamax may require adjustments in marketing strategy, but it did not establish even a likelihood of harm. Nor did the testimony invoke concern that denial of monopoly power over home-use recording would significantly dissuade authors and producers from creating audiovisual material for television.

In so ruling, this court does not minimize plaintiffs' concerns. The new technology of videotape recording does bring uncertainty and change which, quite naturally, induce fear. History, however, shows that this fear may be misplaced. As Lewis Wasserman, Chairman of MCA, observed at trial:

> "[P]eople that have constantly forecast the doom of a particular industry in the entertainment industry have historically been wrong. . . . They forecast the doom of radio stations when television developed on the horizon. Radio stations are more profitable today than they have ever been." Television production by plaintiffs today is more profitable than it has ever been, and, in five weeks of trial, there was no concrete evidence to suggest that the Betamax will change the studios' financial picture.

VII. *ORDER*

A judgment shall be entered as follows:

It is ordered, adjudged and decreed that:

1. Each of the plaintiffs' requests for injunctive relief is denied.

2. Each of the plaintiffs' requests for declaratory relief is denied.

3. The plaintiffs' requests for damages and profits are denied.

4. Noncommercial home-use recording of material broadcast over the public airwaves does not constitute copyright infringement. Such recording is permissible under the Copyright Acts of 1909 and 1976 and as a fair use of the copyrighted works.

5. No defendant has competed unfairly with either plaintiff or engaged in unfair and fraudulent business practices in violation of 15 U.S.C. § 1125(a) or the laws of California.

6. No defendant has unlawfully and intentionally interfered with the contractual and advantageous business relationships of either plaintiff.

7. None of the retail or corporate defendants is directly, contributorily or vicariously liable for home-use copying.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the court finds that there is no just reason for delay and directs that a final judgment shall be entered in accordance with Rules 58 and 79(a) in CV 76-3520-F. In the event that this judgment is determined not to be final, pursuant to 28 U.S.C. § 1292(b), the court declares that this opinion involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation in this case.

IT IS FURTHER ORDERED that the clerk forthwith serve copies of this memorandum opinion by United States mail upon counsel for the parties appearing in this action.

APPENDIX C.

Order.

United States Court of Appeals, Ninth Circuit.

Universal City Studios, Inc., a corporation, dba Universal Television and Universal Pictures and Walt Disney Productions, a corporation, Appellants and Cross-Appellees, v. Sony Corporation of America, a corporation, The Sony Corporation, a corporation, Carter Hawley Hale Stores, Inc., a corporation, Associated Dry Goods Corporation, a corporation, Federated Department Stores, Inc., a corporation, Henry's Camera Corporation, a corporation, Doyle Dane Bernbach, Inc., a corporation, and William Griffiths, Appellees and Cross-Appellants, Nos. 79-3683, 79-3735, and 79-3762.

Appeals from the United States District Court Central District of California.

Before: Kilkenny and Canby, Circuit Judges, and East, District Judge.*

Filed January 12, 1982.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing *in banc*.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing *in banc*. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing *in banc* is rejected.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX D.

United States Constitution, Article I, § 8, Cl. 8.

"The Congress shall have Power . . .

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . . ."

Copyright Revision Act of 1976.

Sec. 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

* * *

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

* * *

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

* * *

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

* * *

A "device", "machine", or "process" is one now known or later developed.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case

of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The terms "including" and "such as" are illustrative and not limitative.

* * *

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

* * *

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

* * *

Sec. 106. Exclusive Rights in Copyrighted Works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual

images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Sec. 107. Limitations on Exclusive Rights: Fair Use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Sec. 411. Registration as Prerequisite to Infringement Suit

(a) Subject to the provisions of subsection (b), no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner—

(1) serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

(2) makes registration for the work within three months after its first transmission.

Sec. 501. Infringement of Copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

* * *

Sec. 502. Remedies for Infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

* * *

Sec. 504. Remedies for Infringement: Damages and Profits

(a) IN GENERAL.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) ACTUAL DAMAGES AND PROFITS.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) STATUTORY DAMAGES.

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $250 or more than $10,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $50,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion

may reduce the award of statutory damages to a sum of not less than $100. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

Copyright Act of 1909.

§ 1. Exclusive rights as to copyrighted works

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

* * *

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

* * *

(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending,

reproductions of the copyrighted work if it be a sound recording: *Provided,* That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided further,* That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use.

Joint Appendix

Office - Supreme Court, U.S.
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CLERK

No. 81-1687
IN THE

Supreme Court of the United States

October Term, 1982

SONY CORPORATION OF AMERICA, *et al.*,
Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOINT APPENDIX.

DEAN C. DUNLAVEY,
(Counsel of Record),
DONALD E. SLOAN,
GIBSON, DUNN & CRUTCHER,
515 South Flower Street,
Los Angeles, Calif. 90071,
(213) 488-7000,
Attorneys for Petitioners.

STEPHEN A. KROFT,
(Counsel of Record),
JOHN G. DAVIES,
SONDRA E. BERCHIN,
ROSENFELD, MEYER & SUSMAN,
9601 Wilshire Boulevard,
Suite 444,
Beverly Hills, Calif. 90210,
(213) 858-7700,
Attorneys for Respondents.

PETITION FOR CERTIORARI FILED MARCH 12, 1982
CERTIORARI GRANTED JUNE 14, 1982

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JOINT APPENDIX

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Chronological List of Relevant Docket Entries.

United States District Court (C.D. Cal.) — 76 3520-F

11/11/76	1.	Fld complt. Issd summs.
1/31/77	39.	Fld defts Sony Corp of America, Sony Corp & Doyle Dane Bernbach's ANSWER to complt.
	40.	Fld deft Carter Hawley's ANSWER to complt.
	41.	Fld deft Henry's Camera Corp's ANSWER to complt.
	42.	Fld deft Bullocks, Inc's ANSWER to complt.
	43.	Fld deft J. W. Robinson's ANSWER to complt.
3/28/77	86.	Fld Crt's memorandum opinion. [dism Cts VII, VIII complt].
7/25/77	194.	MIN ORD: Hrg pltf's mot for partl S/J, etc: Mot Granted to strk 8th & 9th defenses w/lv for defts to amnd answs by 8/18/77. Ea side to sub prlm P/T briefs by 8/15/77.
8/3/77	204.	Fld ORD that defts hv to 8/18/77 to file petns to amnd sd answers.
10/3/77	253.	MIN ORD: HRG re defts' mtn to amend ans by re-pleading & addng defenses. Oral args heard. Amendment as to Causes 10 & 11 Grtd; as to 8 & 9 tkn under subm until after trial on infringement.
10/12/77	264.	Fld ORD that the mtn of defts to amend ans by re-pleading & adding affirmative defenses is Grtd as to the 10th & 11th affirmative defenses; as to the 8th & 9th affirmative defenses, the mtn will be held under subm until after the trial of this actn on the cpyright infringement issues.
10/18/77	266.	Fld defts Sonam, Sony & DDBI's AMENDED ANSWER to complt.
10/31/77	287.	MIN ORD: Plfts' mtn to compel disc & pltf's mtn for lv to amend complt. Hrg held. ORDS pltfs' disc mtn Grtd in part & Denied in part. ORDS pltfs' mtn for lv to amnd complt grtd but advises cnsl that should pltfs choose to file an A/C, trial of the above case will not proceed until 5/1/78. ORDS case cont 11/2/77, 9:30 am. for fur hrg on the above mattrs.
11/2/77	289.	MIN ORD: Fur Hrg: Pltfs' mtn to compel disc; pltfs' mtn to amend complt. Pltfs' mtn to compel disc Grtd in part & Denied in part. Plfts' mtn amend complt Grtd. A/C to be fld by 11/4/77; response due 30 dys frm that dt. The case is cal for PT on 4/12/78, 1:30 pm in Tucson, Arizona. Trial Set for 5/2/78, 2 pm.

11/9/77	292.	Fld Pltf's 1st SUPPL & AMENDED COMPLAINT.
11/10/77	295.	Fld ORD granting lv to file a suppl & A/C.
1/30/78	151.	MIN ORD: HRG re mtns of defts to dsm for more definite stmt re 1st suppl & A/C. Oral args heard. Crt rules as follows: Cts 5 and 13 dsm Grtd; Cts 4 & 6 dsml Grtd w/o prej, but not be raised in this actn. Declrty jdgmt Ct — dsml Denied. Unknown infrgmt & dmgs Cts — mtn to strike Grtd w/o Cts 14-17 — mtns Denied.
2/21/78	173.	Fld ORD re dsml striking frm 1st suppl & A/C.
3/6/78	179.	Fld defts Sony Corporation of America, Sony Corporation & Doyle Dane Bernbach's ANSWER to first supplemental & amended complaint.
	180.	Fld defts Carter Hawley Hale Stores, Inc., Associated Dry Goods Corp., Federated Department Stores, Inc., & Henry's Camera Corporation's ANSWER to first supplemental & amended complt.
3/22/78	212.	MIN ORD: Hrg on Mot for reconsideratn of vactng trial date. Crt DENIES pltf's mot. Anti-trust iss to be tried after infringmnt iss.
6/8/78	239.	Fld ORD that pltfs Ex Parte applctn for reconsidertn of the Crts 3/17/78 rlg & for re-settg of trial in 5/78 is DENIED. PTC will be held on 11/13/78, 10 am. etc.
7/13/78	–	Fld stip re amendment of 1st suppl & amnd complt & ORD allowing 2nd filing of A/C.
7/25/78	241.	Fld Pltfs SECOND SUPPLEMENTAL & AMENDED COMPLAINT.
12/11/78	83.	MIN ORD: hrg deft's mot to compel discov; mattr of validity of copyright to be tried separately aft trial now set for 1/30/79.
2/5/79	128.	Fld ORD that the issu of cpyright validity & cpyrt renewal validity can be isolated fr the other issu to be initially tried at the trial commencg 1/30/79. Defts mtn will be held under subm until the concl of the aforementioned 1/30/79 trial.
10/2/79	94.	Fld MEMORANDUM OPINION.

95. Fld jdgmt & ORD thereon that ea of plfs' rqst for inj relief is Denied; Ea of plfs' rqsts for dclrtry relief is Denied plfs' rqsts for dmgs & profit are DENIED; Non commercial home use recording does not constitute copyright infringement; defts has not competed unfairly; etc. (Ent 10/9/79 ntfd prtys) JS-6.

10/5/79 96. Fld Crt's ntc of chng in opinion to correct clerical errors.

11/1/79 98. Fld pltfs' NOTC OF APPEAL to 9th Cir C/A frm jdgmt ent 10-9-79. $70.00 fldng & docket fees pd.

11/13/79 99. Fld defts' CROSS NOTC OF APPEAL to 9th Cir C/A frm 10-9-79. $70 fldng & docket fees pd.

United States Court of Appeals for the Ninth Circuit — Nos. 79-3683, 79-3735, 79-3762

10/19/81 Opinion filed

10/19/81 Judgment filed and entered

1/12/82 Order Denying Petition for Rehearing filed

First Supplemental and Amended Complaint for Copyright Infringement, Unfair Competition, Intentional Interference With Contractual and Advantageous Business Relationships, and Declaratory Judgment.

United States District Court Central District of California.

Universal City Studios, Inc., a corporation, dba Universal Television and Universal Pictures, and Walt Disney Productions, a corporation, Plaintiffs, v. Sony Corporation of America, a corporation, The Sony Corporation, a corporation, Carter Hawley Hale Stores, Inc., a corporation, Associated Dry Goods Corporation, a corporation, Federated Department Stores, Inc., a corporation, Henry's Camera Corporation, a corporation, Doyle Dane Bernbach, Inc., a corporation, and William Griffiths, Defendants. No. CV 76 3520 F.

Filed: November 9, 1977.

Plaintiffs complain and allege as follows:

JURISDICTION

1. This is an action for copyright infringement under the Copyright Act of the United States, Title 17, United States Code, §§1 et seq. (''the Copyright Act''), and for unfair competition, and for intentional interference with contractual and advantageous business relationships and for declaratory judgment. Jurisdiction over Counts I through X is conferred by virtue of Title 28, U.S.C. §1338(a). Jurisdiction over Count XI is conferred by virtue of Title 28, U.S.C. §§1338(a) and 2201. Jurisdiction over Counts XII and XIII is conferred by virtue of Title 15, U.S.C. §§1121, 1125(a) and Title 28, U.S.C. §1338(a). Jurisdiction over Counts XIV, XV, XVI and XVII is conferred by virtue of Title 15, U.S.C. §§1121, 1126 and Title 28, U.S.C. §1338(a) and, in the alternative, by virtue of Title 28,

U.S.C. §1338(b) and by the doctrine of pendant jurisdiction, such counts being claims arising out of substantially the same facts as Counts I through XIII.

THE PARTIES

2. Plaintiff Universal City Studios, Inc. (''Universal'') is now and at all times mentioned herein was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and qualified to do business in the State of California, with its principal place of business in Los Angeles County, California. At all times mentioned herein, Universal has done business under its own name and under the fictitious names, among others, of Universal Television, Universal Pictures, Universal 16 and United World Films. Universal is a wholly owned subsidiary of MCA Inc.

3. Plaintiff Walt Disney Productions (''Disney'') is now and at all times mentioned herein was a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in Orange County, California.

4. Plaintiffs are informed and believe and therefore allege that defendant Sony Corporation of America (''Sony America'') is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the State of New York and qualified to do business and doing business in the State of California; and that its principal office in said state is located in Los Angeles County, California. Sony America is a wholly owned subsidiary of The Sony Corporation.

5. Plaintiffs are informed and believe and therefore allege that defendant The Sony Corporation (''Sony'') is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the Country of

Japan and is and at all times mentioned herein was transacting business in the State of California, County of Los Angeles.

6. Plaintiffs are informed and believe and therefore allege that defendant Carter Hawley Hale Stores, Inc. ("Carter Hawley") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the State of California, with its principal place of business in Los Angeles County, California.

7. Plaintiffs are informed and believe and therefore allege that defendant Associated Dry Goods Corporation ("Associated/Robinson") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the State of California, or some other state, with its principal place of business in Los Angeles County, California.

8. Plaintiffs are informed and believe and therefore allege that defendant Federated Department Stores, Inc. ("Federated/Bullock's") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the State of California, or some other state, with its principal place of business in Los Angeles County, California.

9. Plaintiffs are informed and believe and therefore allege that defendant Henry's Camera Corporation ("Henry's Camera") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the State of California, with its principal place of business in Los Angeles County, California.

10. The defendants identified in paragraphs 6 through 9 hereinabove shall sometimes be collectively referred to hereinafter as "the retail defendants".

11. Plaintiffs are informed and believe and therefore allege that defendant Doyle Dane Bernbach, Inc. ("DDBI") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the State of California, with its principal place of business in Los Angeles County, California.

12A. Plaintiffs are informed and believe and therefore allege that defendant William Griffiths is now and at all times mentioned herein was a resident and citizen of the State of California, County of Los Angeles.

12B. Plaintiffs are informed and believe and therefore allege that James Lowe is now and at all times mentioned herein was a resident and citizen of the State of Florida.

12C. Plaintiffs are informed and believe and therefore allege that Mr. and Mrs. Geoffrey Soule are now and at all times mentioned herein were residents and citizens of the State of California, County of Los Angeles.

12D. Plaintiffs are informed and believe and therefore allege that Mr. and Mrs. Clinton Bird are now and at all times mentioned herein were residents and citizens of the State of California, County of Los Angeles.

12E. Plaintiffs are informed and believe and therefore allege that Marc Wielage is now and for a substantial period of time has been a resident and citizen of the State of California, County of Los Angeles.

COUNT I

(By Universal Against Sony, Sony America, Carter Hawley And DDBI For Copyright Infringement)

13. Universal hereby refers to paragraphs 1, 2, 4, 5, 6, 10 and 11 hereinabove and incorporates them, each and all, herein by this reference.

14. Universal is now and at all times mentioned herein was the producer of motion pictures for theatrical and television exhibition. All of such motion pictures are duly copyrighted under the Copyright Act; and such copyrights are owned by Universal. Universal is also the owner and proprietor of several motion pictures, and the copyrights therein, which were produced and originally copyrighted by persons other than Universal.

15. Many of the copyrighted motion pictures produced and owned by Universal have been, are now and will in the future be exhibited on television as feature movies, episodes of network television series and episodes of syndicated television series.

16. Plaintiffs are informed and believe and therefore allege that defendant Sony is the manufacturer of and is presently manufacturing a videotape recording machine known as "Betamax" which is sold in two models designated as follows: (1) Model Nos. SL-7200, SL-8200 and SLO-260 ("table model") and (2) Model No. LV-1901 ("console model"); plaintiffs are further informed and believe and therefore allege that Sony is currently manufacturing other videotape recording machines designated by model numbers and names currently unknown to plaintiffs. (The table model and console model and all other said videotape recording machines will sometimes hereinafter collectively be referred to as "Betamax".) Betamax is designed and manufactured by Sony for sale to owners of television sets in the United States who watch television shows on said television sets in the United States, including motion pictures produced, copyrighted and owned by plaintiffs.

17. Plaintiffs are informed and believe and therefore allege that Sony is the manufacturer of and is presently manufacturing videotape cassettes for use in the Betamax (hereinafter "Betamax tapes").

18. Defendant Sony America is the United States distributor of Betamax and Betamax tapes. Said defendant is currently selling and distributing Betamax and Betamax tapes for sale to the public in the United States. Plaintiffs are informed and believe and therefore allege that Sony America has sold and distributed and is selling and distributing Betamax and Betamax tapes to the retail defendants and other retail television sales outlets throughout the United States.

19. The Betamax is designed, manufactured, sold and distributed by defendants for the main and primary purpose of inducing and allowing purchasers thereof to record on Betamax tapes copies of television shows, including motion pictures owned and copyrighted by plaintiffs.

20. Plaintiffs are informed and believe and therefore allege that Sony, Sony America and DDBI have engaged in a nationwide advertising campaign, and in furtherance thereof, have produced and published and exhibited and broadcast to the public televised, sound recorded and printed advertisements and brochures throughout the United States, in interstate commerce, for the purpose of selling Betamax and Betamax tapes to the public for use by the public in making copies of television shows, including motion pictures owned and copyrighted by plaintiffs. An example of such advertisements is attached hereto as Exhibit "A" and is incorporated in full herein by reference. The retail defendants have also participated in said advertising campaign. Plaintiffs are informed and believe and therefore allege that said defendants and the retail defendants are continuing and intend to continue to engage in said advertising campaign.

20A. By engaging in the acts and conduct herein alleged, Sony, Sony America, DDBI and the retail defendants have induced, encouraged, solicited, aided and abetted the infringement of the copyrights owned by plaintiffs as herein-

after alleged. All of said acts and conduct have occurred in or have affected interstate commerce.

21. The retail defendants and the other retail television sales outlets referred to in paragraph 18 hereinabove have sold and are offering for sale and are selling Betamax and Betamax tapes throughout the United States for the purpose of inducing and allowing purchasers thereof to record and copy on Betamax tapes television shows, including motion pictures owned and copyrighted by plaintiffs. Said purchasers are, in fact, using their Betamax and Betamax tapes to record and copy copyrighted motion pictures owned by plaintiffs without the consent of plaintiffs.

22. In or about September, 1976, defendant Carter Hawley used a Betamax and recorded and copied on a Betamax tape a substantial portion of a motion picture owned and copyrighted by Universal which is part of the television series entitled "Adam 12". Said copy was made by Carter Hawley for the purpose of demonstrating and selling Betamax and Betamax tapes to the public. Universal is informed and believes and therefore alleges that on October 1, 1976, and on other dates currently unknown to Universal, Carter Hawley exhibited said copy of said motion picture to members of the public for the aforesaid purpose. Universal has complied in all respects with the Copyright Act with respect to said motion picture and the copyright therein. Universal has applied for and received a Certificate of Registration of a Claim to Copyright in said motion picture. The title and copyright registration number and registration date of said motion picture are currently unknown to Universal, but Universal will seek leave to amend this paragraph when said information becomes known to Universal. The foregoing conduct was without Universal's consent and constituted an infringement upon Universal's copyright in said motion picture.

23. On October 18, 1976, defendant Carter Hawley, in public, used a Betamax and recorded and copied on a Betamax tape a substantial portion of a motion picture entitled "The Sakai Ito Story", which is an episode of the television series entitled "Major Adams". Thereafter, said defendant exhibited said copy to the public. Said motion picture, and the copyright therein, is owned by Universal. Revue Productions, Inc. ("Revue") applied for and received a Certificate of Registration of a Claim to Copyright in said motion picture with the following registration number and registration date: LP 13563, April 20, 1959. Prior to October 18, 1976, Revue assigned said copyright to Universal. Revue and Universal have complied in all respects with the Copyright Act with respect to said motion picture and the copyright therein. The foregoing conduct was without Universal's consent and constituted infringements upon Universal's copyright in said motion picture.

24. Universal is informed and believes and therefore alleges that Carter Hawley has recorded and copied on Betamax and Betamax tapes many other motion pictures owned and copyrighted by Universal and has exhibited such copies to the public for the purpose of selling Betamax and Betamax tapes. Carter Hawley has thereby infringed Universal's copyrights in said motion pictures. Universal is unaware of the titles and copyright registration numbers of said motion pictures and the dates of copying and exhibition thereof by Carter Hawley; Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

25. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the con-

tents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Universal does not have in its possession and is unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, Universal is unable to attach copies thereof to this Complaint.

26. Universal is informed and believes and therefore alleges that Carter Hawley has sold Betamax and Betamax tapes to members of the public in California (including Los Angeles County) and in other states for the purpose of inducing and allowing purchasers thereof to record and copy on Betamax tapes television shows, including motion pictures owned and copyrighted by Universal. Universal is informed and believes and therefore alleges that the purchasers of said Betamax and Betamax tapes have used them to record and copy and have recorded and copied several motion pictures owned and copyrighted by Universal. Said copies were made without Universal's consent and constitute infringements upon Universal's said copyrights. Universal does not know (a) the number of Betamax and Betamax tapes sold by Carter Hawley, (b) the identities of the purchasers of said Betamax and Betamax tapes, or (c) the titles and copyright registration numbers of the motion pictures copied as aforesaid. However, Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

27. The foregoing acts and conduct of defendants have been without the consent of Universal and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Universal has been damaged in an amount currently unknown to Univer-

sal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

28. Universal is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by defendants, and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

29 The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Universal's copyrights in the motion pictures owned and copyrighted by Universal unless restrained and enjoined by this Court from doing so.

30. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

31. Universal is informed and believes and therefore alleges that in doing the acts and things alleged hereinabove,

defendants, and each of them, acted in bad faith and in complete disregard of the rights of Universal, and Universal is therefore entitled to recover as part of its costs herein reasonable attorneys' fees to be awarded by the Court.

COUNT II

(By Universal Against Sony, Sony America, Associated/ Robinson And DDBI For Copyright Infringement)

32. Universal hereby refers to paragraphs 1, 2, 4, 5, 7, 10 and 11, and paragraphs 14 through 21, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

33. On October 14, 1976, defendant Associated/ Robinson, in public, used a Betamax and recorded and copied on a Betamax tape a substantial portion of a motion picture entitled "Run Sam, Run", which is an episode of the television series entitled "Gemini Man". Thereafter, said defendant exhibited said copy to the public. Said motion picture is owned and copyrighted by Universal and Universal has applied for and received a Certificate of Registration of a Claim to Copyright in said motion picture with the following registration number and registration date: LP 46642, November 5, 1976. Universal has complied in all respects with the Copyright Act with respect to said motion picture and the copyright therein. The foregoing conduct was without Universal's consent and constituted infringements upon Universal's copyright in said motion picture.

34. Universal is informed and believes and therefore alleges that Associated/Robinson has recorded and copied on Betamax and Betamax tapes many other motion pictures owned and copyrighted by Universal and has exhibited such copies to the public for the purpose of selling Betamax and Betamax tapes. Associated/Robinson has thereby infringed Universal's copyrights in said motion pictures. Universal

is unaware of the titles and copyright registration numbers of said motion pictures and the dates of copying and exhibition thereof by Associated/Robinson; Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

35. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Universal does not have in its possession and is unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, Universal is unable to attach copies thereof to this Complaint.

36. Universal is informed and believes and therefore alleges that Associated/Robinson has sold Betamax and Betamax tapes to members of the public in California (including Los Angeles County) and in other states for the purpose of allowing purchasers thereof to record and copy on Betamax tapes television shows, including motion pictures owned and copyrighted by Universal. Universal is informed and believes and therefore alleges that the purchasers of said Betamax and Betamax tapes have used them to record and copy and have recorded and copied several motion pictures owned and copyrighted by Universal. Said copies were made without Universal's consent and constitute infringements upon Universal's said copyrights. Universal does not know (a) the number of Betamax and Betamax tapes sold by Associated/Robinson, (b) the identities of the purchasers of said Betamax and Betamax tapes, or

(c) the titles and copyright registration numbers of the motion pictures copied as aforesaid. However, Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

37. The foregoing acts and conduct of defendants have been without the consent of Universal and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Universal has been damaged in an amount currently unknown to Universal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

38. Universal is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

39. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Universal's copyrights in the aforesaid motion pictures and other motion pictures owned and copyrighted by Universal unless restrained and enjoined by this Court from doing so.

40. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged,

have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

41. Universal is informed and believes and therefore alleges that in doing the acts and things alleged hereinabove, defendants, and each of them, acted in bad faith and in complete disregard of the rights of Universal, and Universal is therefore entitled to recover as part of its costs herein reasonable attorneys' fees to be awarded by the Court.

COUNT III

(By Universal Against Sony, Sony America, Federated/ Bullock's And DDBI For Copyright Infringement)

42. Universal hereby refers to paragraphs 1, 2, 4, 5, 8, 10 and 11, and paragraphs 14 through 21, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

43. On October 14, 1976, defendant Federated/Bullock's, in public, used a Betamax and recorded and copied on a Betamax tape a substantial portion of a motion picture entitled "Captains And The Kings, Chapter III". Thereafter, said defendant exhibited said copy to the public. Said motion picture is owned and copyrighted by Universal, and Universal has applied for and received a Certificate of Registration of a Claim to Copyright in said motion picture with the following registration number and registration date: LP 46643, November 5, 1976. Universal has complied in all respects with the Copyright Act with respect to said motion picture and the copyright therein. The foregoing conduct

was without Universal's consent and constituted infringements upon Universal's copyright in said motion picture.

44. Universal is informed and believes and therefore alleges that Federated/Bullock's has recorded and copied on Betamax and Betamax tapes many other motion pictures owned and copyrighted by Universal and has exhibited such copies to the public for the purpose of selling Betamax and Betamax tapes. Federated/Bullock's has thereby infringed Universal's copyrights in said motion pictures. Universal is unaware of the titles and copyright registration numbers of said motion pictures and the dates of copying and exhibition thereof by Federated/Bullock's; Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

45. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Universal does not have in its possession and is unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, Universal is unable to attach copies thereof to this Complaint.

46. Universal is informed and believes and therefore alleges that Federated/Bullock's has sold Betamax and Betamax tapes to members of the public in California (including Los Angeles County) and in other states for the purpose of allowing purchasers thereof to record and copy on Betamax tapes television shows, including motion pictures owned and copyrighted by Universal. Universal is

informed and believes and therefore alleges that the purchasers of said Betamax and Betamax tapes have used them to record and copy and have recorded and copied several motion pictures owned and copyrighted by Universal. Said copies were made without Universal's consent and constitute infringements upon Universal's said copyrights. Universal does not know (a) the number of Betamax and Betamax tapes sold by Federated/Bullock's, (b) the identities of the purchasers of said Betamax and Betamax tapes, or (c) the titles and copyright registration numbers of the motion pictures copied as aforesaid. However, Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

47. The foregoing acts and conduct of defendants have been without the consent of Universal and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Universal has been damaged in an amount currently unknown to Universal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

48. Universal is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

49. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Universal's copyrights in the aforesaid motion pictures and other motion pictures owned and copyrighted by Universal unless restrained and enjoined by this Court from doing so.

50. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

51. Universal is informed and believes and therefore alleges that in doing the acts and things alleged hereinabove, defendants, and each of them, acted in bad faith and in complete disregard of the rights of Universal, and Universal is therefore entitled to recover as part of its costs herein reasonable attorneys' fees to be awarded by the Court.

COUNT IV

(By Universal Against Sony, Sony America, Henry's Camera And DDBI For Copyright Infringement)

52. Universal hereby refers to paragraphs 1, 2, 4, 5, 9, 10 and 11, and paragraphs 14 through 21, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

53. Universal is informed and believes and therefore alleges that Henry's Camera has copied on Betamax and Betamax tapes many motion pictures owned and copyrighted by Universal and has exhibited such copies to the

public for the purpose of selling Betamax and Betamax tapes. Henry's Camera has thereby infringed Universal's copyrights in said motion pictures. Universal is unaware of the titles and copyright registration numbers of said motion pictures and the dates of the copying and exhibition thereof by Henry's Camera; Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

54. Universal is informed and believes and therefore alleges that Henry's Camera has sold Betamax and Betamax tapes to members of the public in California (including Los Angeles County) and in other states for the purpose of allowing purchasers thereof to record and copy on Betamax tapes television shows, including motion pictures owned and copyrighted by Universal. Universal is informed and believes and therefore alleges that the purchasers of said Betamax and Betamax tapes have used them to record and copy and have recorded and copied several motion pictures owned and copyrighted by Universal. Said copies were made without Universal's consent and constitute infringements upon Universal's said copyrights. Universal does not know (a) the number of Betamax and Betamax tapes sold by Henry's Camera, (b) the identities of the purchasers of said Betamax and Betamax tapes, or (c) the titles and copyright registration numbers of the motion pictures copied as aforesaid. However, Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

55. The foregoing acts and conduct of defendants have been without the consent of Universal and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Universal has been damaged in an amount currently unknown to Univer-

sal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

56. Universal is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

57. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Universal's copyrights in the aforesaid motion pictures and other motion pictures owned and copyrighted by Universal unless restrained and enjoined by this Court from doing so.

58. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

59. Universal is informed and believes and therefore alleges that in doing the acts and things alleged hereinabove,

defendants, and each of them, acted in bad faith and in complete disregard of the rights of Universal, and Universal is therefore entitled to recover as part of its costs herein reasonable attorneys' fees to be awarded by the Court.

COUNT V

(By Universal Against Sony, Sony America, Henry's Camera, DDBI And William Griffiths For Copyright Infringement)

60. Universal hereby refers to paragraphs 1, 2, 4, 5, 9, 10, 11 and 12A, and paragraphs 14 through 21, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

61. Within the last three years, defendant William Griffiths purchased a Betamax and Betamax tapes from Henry's Camera and used them to record and copy, and did record and copy, the following motion picture owned and copyrighted by Universal and Newman-Foreman Company, Inc. ("Newman-Foreman"): "Never Give An Inch" (originally entitled "Sometimes A Great Notion"). Universal and Newman-Foreman have complied in all respects with the Copyright Act with respect to such motion picture and the copyright therein. Universal and Newman-Foreman have applied for and received a Certificate of Registration of a Claim to Copyright in said motion picture with the following registration number and registration date: LP 41090, September 29, 1972.

61A. Within the last three years, defendant William Griffiths has also used his Betamax and Betamax tapes to record and copy and has recorded and copied the following additional motion pictures owned and copyrighted by Universal:

(a) "Alpha Caper";

(b) "Amelia Earhart";

(c) an episode of "Baa Baa Blacksheep" entitled "Presumed Dead"; and

(d) an episode of "Holmes And Yo-Yo" entitled "The Last Phantom".

Said copies were made without Universal's consent and constitute infringements upon Universal's said copyrights. Universal has applied for and received a Certificate of Registration of a Claim to Copyright in each of said motion pictures with the following registration numbers and registration dates:

Title	*Reg. No.*	*Reg. Date*
"Alpha Caper"	LP 46893	7/25/75
"Amelia Earhart"	LP 48968	9/28/77
"Presumed Dead"	LP 48969	9/28/77
"The Last Phantom"	LP 48966	9/28/77

Universal has complied in all respects with the Copyright Act with respect to such motion pictures and the copyrights therein.

61B. The foregoing conduct was without the consent of Universal or Newman-Foreman and constituted infringements upon the copyrights in said motion pictures. The said Betamax and Betamax tapes were sold to defendant William Griffiths by defendant Henry's Camera for the purpose of allowing defendant William Griffiths to record and copy television shows, including motion pictures produced, copyrighted and owned by Universal.

61C. The said Betamax and Betamax tapes were manufactured for profit by Sony and were sold for profit by Sony America to defendant Henry's Camera for the purpose of having defendant Henry's Camera sell the Betamax and Betamax tapes for profit to purchasers such as defendant William Griffiths. Sony and Sony America and DDBI engaged in the aforesaid conduct and Henry's Camera sold

the aforesaid Betamax and Betamax tapes to William Griffiths with the knowledge and intent that said purchasers would use the Betamax and Betamax tapes to record and copy television shows, including motion pictures produced, copyrighted and owned by Universal. Neither Sony, Sony America, DDBI nor Henry's Camera took any steps to police or control the content of the recordings made by defendant William Griffiths on said Betamax, although it was within their power to do so.

62. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Universal does not have in its possession and is unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, Universal is unable to attach copies thereof to this Complaint.

63. Omitted.

64. The foregoing acts and conduct of defendants have been without the consent of Universal or Newman-Foreman and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, Universal has been damaged in an amount currently unknown to Universal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

65. Universal is informed and believes and therefore alleges that defendants Sony, Sony America, DDBI and Henry's Camera, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by said defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

66. Defendant William Griffiths threatens and continues to threaten to engage in the acts and conduct set forth hereinaoove and to continue to infringe Universal's copyrights in the motion pictures owned and copyrighted by Universal unless restrained and enjoined by this Court from doing so.

67. The acts, conduct and threatened acts and conduct of defendant William Griffiths as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendant William Griffiths is restrained and enjoined from performing the aforesaid acts and conduct and unless defendants Sony, Sony America, DDBI and Henry's Camera are ordered to take reasonable steps to prevent William Griffiths from performing the foregoing acts and conduct.

COUNT VI

(By Disney Against All Defendants Except William Griffiths For Copyright Infringement)

68. Disney hereby refers to paragraph 1, paragraphs 3 through 11, inclusive, and paragraphs 16 through 21, inclusive, hereinabove, and incorporates them, each and all, herein by this reference as though set forth in full.

69. Disney is now and at all times mentioned herein was the producer of motion pictures for theatrical and television exhibition. All of such motion pictures are duly copyrighted under the Copyright Act; and such copyrights are owned by Disney.

70. Many of the copyrighted motion pictures produced and owned by Disney have been, are now, and will in the future be exhibited on television as feature movies and episodes of television series.

71. Disney is informed and believes and therefore alleges that the retail defendants and the other retail television outlets referred to in paragraph 18 hereinabove have copied on Betamax and Betamax tapes motion pictures owned and copyrighted by Disney and have exhibited such copies to the public for the purpose of selling Betamax and Betamax tapes. Defendants have thereby infringed Disney's copyrights in said motion pictures. Disney is unaware of the titles and copyright registration numbers of said motion pictures and the dates of copying and exhibition thereof; Disney will seek leave to amend this paragraph to allege such information when it becomes known to Disney.

72. Disney is informed and believes and therefore alleges that the retail defendants and the other retail television outlets referred to in paragraph 18 hereinabove have sold Betamax and Betamax tapes to members of the public in California (including Los Angeles County) and in other

states for the purpose of allowing purchasers thereof to record any copy on Betamax tapes television shows, including motion pictures owned and copyrighted by Disney. Disney is informed and believes and therefore alleges that the purchasers of said Betamax and Betamax tapes have used them to record and copy and have recorded and copied several motion pictures owned and copyrighted by Disney. Said copies were made without Disney's consent and constitute infringements upon Disney's said copyrights. Disney does not know (a) the number of Betamax and Betamax tapes sold by the retail defendants and other retail television outlets, (b) the identities of the purchasers of said Betamax and Betamax tapes, or (c) the titles and copyright registration numbers of the motion pictures copied as aforesaid. However, Disney will seek leave to amend this paragraph to allege such information when it becomes known to Disney.

73. The foregoing acts and conduct of defendants have been without the consent of Disney and constitute infringements of the aforesaid copyrights owned by Disney. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Disney has been damaged in an amount currently unknown to Disney. Disney will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Disney.

74. Disney is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Disney is unaware of the exact amount of such profits derived and received by defendants, and Disney will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Disney, and Disney is entitled to an ac-

counting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

75. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Disney's copyrights in the motion pictures owned and copyrighted by Disney unless restrained and enjoined by this Court from doing so.

76. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Disney great and irreparable injury which cannot be adequately compensated or measured in money. Disney has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

77. Disney is informed and believes and therefore alleges that in doing the acts and things alleged hereinabove, defendants, and each of them, acted in bad faith and in complete disregard of the rights of Disney, and Disney is therefore entitled to recover as part of its costs herein reasonable attorneys' fees to be awarded by the Court.

COUNT VII

(By Disney And Universal Against Sony, Sony America and DDBI For Copyright Infringement)

78. Plaintiffs hereby refer to paragraphs 1, 2, 3, 4, 5, 11, 12E, paragraphs 14 through 21, inclusive, and paragraphs 69 and 70, hereinabove and incorporate them, each and all, herein by this reference as though set forth in full.

79. Within the last three years, Marc Wielage purchased a Betamax and Betamax tapes from a retail television outlet

and used them to record and copy, and did record and copy, or caused to be recorded and copied, the following copyrighted motion pictures owned by Disney, or substantial portions thereof:

(a) "Mickey Mouse Club — Show No. C-001";

(b) "Walt Disney Presents — This Is Your Life, Donald Duck";

(c) "On Vacation — Fantasyland — Show No. 26" ("On Vacation With Mickey Mouse And Friends");

(d) "Mickey Mouse Club — Show No. C-028", including the copyrighted animated cartoon entitled "Fire Chief";

(e) "Mickey Mouse Club — Show No. C-024", including the copyrighted animated cartoon entitled "Mickey's Parrot";

(f) "Mickey Mouse Club — Show No. C-026", including the copyrighted animated cartoon entitled "Trick Or Treat";

(g) "Mickey Mouse Club — Show No. C-030", including the copyrighted animated cartoon entitled "The Tortoise And The Hare";

(h) "Mickey Mouse Club — Show No. C-011", including the copyrighted animated cartoon entitled "Clock Cleaners";

(i) "Mickey Mouse Club — Show No. C-082", including the copyrighted animated cartoon entitled "The Autograph Hound";

(j) "Mickey Mouse Club — Show No. C-041", including the copyrighted animated cartoon entitled "The Pointer"; and

(k) "Mickey Mouse Club — Show No. C-049", including the copyrighted animated cartoon entitled "Hawaiian Holiday".

80. Disney has complied in all respects with the Copyright Act with respect to such motion pictures and animated cartoons and the copyrights therein. Disney has applied for and received Certificates of Registration of a Claim to Copyright in each said motion picture and animated cartoon with the following registration numbers and registration dates (and renewal registration numbers and registration dates, where applicable):

Title	*Reg. No.*	*Reg. Date*
"Mickey Mouse Club — Show No. C-001"	MP 31684	10/19/77
"Walt Disney Presents — This Is Your Life, Donald Duck"	LP 19475	6/12/61
"On Vacation — Fantasyland — Show No. 26" ("On Vacation With Mickey Mouse And Friends")	LP 8692	7/12/57
"Mickey Mouse Club — Show No. C-028"	MP 31708	11/8/77
"Fire Chief"	L1:10100	12/11/40
Renewal:	R 427857	1/25/68
"Mickey Mouse Club — Show No. C-024"	MP 31707	11/8/77
"Mickey's Parrot"	M1:8723	8/29/38
Renewal:	R 367156	9/7/65
"Mickey Mouse Club — Show No. C-026"	MP 31706	11/8/77
"Trick Or Treat"	LP 2554	5/14/53
"Mickey Mouse Club — Show No. C-030"	MP 31709	11/8/77
"The Tortoise And The Hare"	M1:5741	7/18/35
Renewal:	R 291829	3/5/62
"Mickey Mouse Club — Show No. C-011"	MP 31711	11/8/77
"Clock Cleaners"	M1:7798	10/1/37
Renewal:	R 342444	8/3/64
"Mickey Mouse Club — Show No. C-082"	MP 31705	11/8/77

Title		*Reg. No.*	*Reg. Date*
"The Autograph Hound"		L1:9351	1/19/40
	Renewal:	R 394379	9/26/66
"Mickey Mouse Club — Show No. C-041"		MP 31710	11/8/77
"The Pointer"		L1:8989	7/26/39
	Renewal:	R 390658	7/26/66
"Mickey Mouse Club — Show No. C-049"		MP 31676	10/19/77
"Hawaiian Holiday"		M1:7799	10/1/37
	Renewal:	R 342445	8/3/64

81. Universal is informed and believes and therefore alleges that within the last three years, Marc Wielage purchased a Betamax and Betamax tapes from a retail television outlet and used them to record and copy, and did record and copy, or caused to be recorded and copied, the following copyrighted motion pictures owned by Universal:

(a) "Frankenstein";
(b) "Bride of Frankenstein";
(c) "Son of Frankenstein";
(d) "The Mummy";
(e) "The Time Of Their Lives";
(f) "This Island Earth";
(g) "The Wolf Man";
(h) "The Mummy's Hand";
(i) "Duel";
(j) "The House of Fear";
(k) "Horsefeathers"; and
(l) "Duck Soup".

The copyright in each of the foregoing motion pictures was originally secured by, and a Certificate of Registration of a Claim to Copyright issued to, the parties listed below with the following registration numbers and registration dates:

Title	*Registrant*	*Reg. No.*	*Reg. Date*
"Frankenstein"	Universal Pictures Corporation	LP 2631	11/17/31
"Bride Of Frankenstein"	Universal Pictures Corporation	LP 5500	4/27/35
"Son Of Frankenstein"	Universal Pictures Company, Inc.	LP 8574	1939
"The Mummy"	Universal Pictures Corporation	L 3478	12/15/32
"The Time Of Their Lives"	Universal Pictures Company, Inc.	LP 513	8/23/46
"This Island Earth"	Universal Pictures Company, Inc.	LP 4492	3/16/55
"The Wolf Man"	Universal Pictures Company, Inc.	LP 10910	12/16/41
"The Mummy's Hand"	Universal Pictures Company, Inc.	LP 9854	1940
"Duel"	Universal City Studios, Inc.	LP 43718	8/6/74
"The House Of Fear"	Universal Pictures Company, Inc.	LP 13029	1/5/45
"Horsefeathers"	Paramount Publix Corporation	L 3209	1932
"Duck Soup"	Paramount Productions, Inc.	LL 4246	1933

82. With respect to each of the aforesaid copyrights for which the original twenty-eight year term has expired, a Certificate of Registration of a Claim to Renewal Copyright was duly applied for and received by the following parties with the following registration numbers and registration dates:

Title	*Registrant*	*Reg. No.*	*Reg. Date*
"Frankenstein"	Universal Pictures Company, Inc.	R 243591	10/12/59
"Bride Of Frankenstein"	Universal Pictures Company, Inc.	R 306308	12/12/62

Title	*Registrant*	*Reg. No.*	*Reg. Date*
"Son Of Frankenstein"	Universal Pictures Company, Inc.	R 379441	2/4/66
"The Mummy"	Universal Pictures Company, Inc.	R 258457	6/17/60
"The Time Of Their Lives"	Universal Pictures, a division of Universal City Studios, Inc.	R 560649	9/7/73
"The Wolf Man"	Universal Pictures, a division of Universal City Studios, Inc.	R 455081	1/23/69
"The Mummy's Hand"	Universal Pictures, a division of Universal City Studios, Inc.	R 417137	9/11/67
"The House Of Fear"	Universal Pictures, a division of Universal City Studios, Inc.	R 518424	12/9/71
"Horsefeathers"	EMKA, Ltd.	R 249564	1/8/60
"Duck Soup"	EMKA, Ltd.	R 267241	11/25/60

83. Universal has acquired lawful ownership of the aforesaid copyrights and renewal copyrights and is, and at all material times alleged herein has been, the owner of said copyrights and renewal copyrights.

84. Universal and its predecessors in interest have complied in all respects with the Copyright Act with respect to such motion pictures and the copyrights and renewal copyrights therein.

85. The foregoing conduct was without the consent of plaintiffs and constituted infringements upon the copyrights and renewal copyrights in said motion pictures and animated cartoons.

86. The said Betamax and Betamax tapes were manufactured for profit by Sony and were sold for profit by Sony

America to said retail television outlet for the purpose of having said retail television outlet sell the Betamax and Betamax tapes for profit to purchasers such as Marc Wielage, with the knowledge and intent that said purchasers would use the Betamax and Betamax tapes to record and copy television shows, including motion pictures produced, copyrighted and owned by plaintiffs. Neither Sony, Sony America, DDBI nor said retail television outlet took any steps to police or control the content of the recordings made by Marc Wielage on said Betamax, although it was within their power to do so.

87. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Plaintiffs request that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Plaintiffs do not have in their possession and are unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, plaintiffs are unable to attach copies thereof to this Complaint.

88. Plaintiffs are informed and believe and therefore allege that Marc Wielage has used his Betamax and Betamax tapes to copy and has copied several other motion pictures owned and copyrighted by plaintiffs.

89. The foregoing acts and conduct of defendants have been without the consent of plaintiffs and constitute infringements of the aforesaid copyrights owned by plaintiffs. As a direct and proximate result of the foregoing acts and conduct of defendants, plaintiffs have been damaged in an amount currently unknown to plaintiffs.

90. Plaintiffs are informed and believe and therefore allege that defendants Sony, Sonam and DDBI, and each of them have derived and received substantial profits from the foregoing wrongful acts and conduct. Plaintiffs are unaware of the exact amount of such profits derived and received by said defendants and plaintiffs will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of plaintiffs, and plaintiffs are entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

91. Marc Wielage threatens and continues to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe plaintiffs' copyrights in the motion pictures owned and copyrighted by plaintiffs.

92. The acts, conduct and threatened acts and conduct of Marc Wielage as hereinabove alleged, have caused and are causing, and will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants Sony, Sony America and DDBI are ordered to take reasonable steps to prevent Marc Wielage from performing the aforesaid acts and conduct.

COUNT VIII

(By Universal Against Sony, Sony America, DDBI And Robinson For Copyright Infringement)

93. Universal hereby refers to paragraphs 1, 2, 4, 5, 7, 11, 12D, 14 through 21, inclusive, 34, and 36 through 41, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

94. Within the last three years, Mr. and Mrs. Clinton Bird purchased a Betamax and Betamax tapes from Associated/Robinson and used them to record and copy, and did record and copy, the following copyrighted motion pictures owned by Universal:

(a) Two episodes from the "Bionic Woman" television series entitled (a) "Fembots In Las Vegas, Part I" and (b) "Fembots In Las Vegas, Part II"; and

(b) an episode from the "Quincy" television series entitled "Who's Who In Neverland".

95. Universal has complied in all respects with the Copyright Act with respect to such motion pictures and the copyrights therein. Universal has applied for and received Certificates of Registration of a Claim to Copyright in each of said motion pictures with the following registration numbers and registration dates:

Title	*Reg. No.*	*Reg. Date*
Two episodes from the "Bionic Woman" television series entitled		
(a) "Fembots In Las Vegas, Part I"	LP 49338	11/8/77
(b) "Fembots In Las Vegas, Part II"	LP 49339	11/8/77
Episode from "Quincy" television series entitled "Who's Who In Neverland"	LP 48967	9/28/77

96. The foregoing conduct was without the consent of Universal and constituted infringements upon the copyrights in said motion pictures.

97. The said Betamax and Betamax tapes were manufactured for profit by Sony and were sold for profit by Sony America to Associated/Robinson for the purpose of having Associated/Robinson sell the Betamax and Betamax tapes for profit to purchasers such as Mr. and Mrs. Clinton Bird. Sony, Sony America and DDBI engaged in the aforesaid conduct and Associated/Robinson sold the aforesaid Betamax and Betamax tapes for profit to Mr. and Mrs. Clinton

Bird with the knowledge and intent that said purchasers would use the Betamax and Betamax tapes to record and copy television shows, including motion pictures produced, copyrighted and owned by Universal. Neither Sony, Sony America, DDBI nor Associated/Robinson took any steps to police or control the content of the recordings made by Mr. and Mrs. Clinton Bird on said Betamax, although it was within their power to do so.

98. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Universal does not have in its possession and is unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, Universal is unable to attach copies thereof to this Complaint.

99. Universal is informed and believes and therefore alleges that Mr. and Mrs. Clinton Bird have used their Betamax and Betamax tapes to copy and have copied several other motion pictures owned and copyrighted by Universal.

100. The foregoing acts and conduct of defendants have been without the consent of Universal and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, Universal has been damaged in an amount currently unknown to Universal.

101. Universal is informed and believes and therefore alleges that defendants Sony, Sonam, DDBI and Associated/

Robinson, and each of them have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by said defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

102. Mr. and Mrs. Clinton Bird threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Universal's copyrights in the motion pictures owned and copyrighted by Universal.

103. The acts, conduct and threatened acts and conduct of Mr. and Mrs. Clinton Bird as hereinabove alleged, have caused and are causing, and will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants Sony, Sony America, Associated/Robinson and DDBI are ordered to take reasonable steps to prevent Mr. and Mrs. Clinton Bird from performing the aforesaid acts and conduct.

COUNT IX

(By Disney And Universal Against Sony, Sony America And DDBI For Copyright Infringement)

104. Plaintiffs hereby refer to paragraphs 1, 2, 3, 4, 5, 11, 12B, paragraphs 14 through 21, inclusive, and paragraphs 69 and 70, hereinabove and incorporate them, each and all, herein by this reference as though set forth in full.

105A. Within the last three years, James Lowe purchased a Betamax and Betamax tapes from a retail television outlet known as Trigger Enterprises and used them to record and copy, and did record and copy, the following copyrighted motion picture owned by Universal: "Psycho". The copyright in such motion picture was originally secured by, and a Certificate of Registration of a Claim to Copyright issued to, Shamley Productions ("Shamley"). The aforesaid Certificate of Registration bears the following registration number and registration date: LP 16674, August 5, 1960. Universal has acquired lawful ownership of said copyright and is, and at all material times alleged herein has been, the owner of said copyright. Universal and Shamley have complied in all respects with the Copyright Act with respect to such motion picture and the copyright therein.

105B. Within the last three years, James Lowe used the aforesaid Betamax and Betamax tapes to record and copy, and did record and copy, or caused to be recorded and copied, the following copyrighted motion pictures owned by Disney, or substantial portions thereof:

(a) "Mickey Mouse Club — Show No. C-003", including the copyrighted animated cartoon entitled "Donald Applecore";

(b) "Mickey Mouse Club — Show No. C-015", including the copyrighted animated cartoon entitled "Pluto's Quinpuplets";

(c) "Mickey Mouse Club — Show No. C-035", including the copyrighted animated cartoon entitled "Modern Inventions";

(d) "Mickey Mouse Club — Show No. C-040", including the copyrighted animated cartoon entitled "Two Chips And A Miss";

(e) "Mickey Mouse Club — Show No. C-044", including the copyrighted animated cartoon entitled "Donald's Better Self"; and

(f) "Mickey Mouse Club — Show No. C-079", including the copyrighted animated cartoon entitled "Spare The Rod".

105C. Disney has complied in all respects with the Copyright Act with respect to such motion pictures and animated cartoons and the copyrights therein. Disney has applied for and received Certificates of Registration of a Claim to Copyright in each said motion picture and animated cartoon with the following registration numbers and registration dates (and renewal registration numbers and registration dates, where applicable):

Title		*Reg. No.*	*Reg. Date*
"Mickey Mouse Club — Show No. C-003"		MP 31682	10/19/77
"Donald Applecore"		LP 1399	1/10/52
"Mickey Mouse Club — Show No. C-015"		MP 31681	10/19/77
"Pluto's Quinpuplets"		M1:7801	10/1/37
	Renewal:	R 338798	5/28/64
"Mickey Mouse Club — Show No. C-035"		MP 31679	10/19/77
"Modern Inventions"		M1:7600	7/14/37
	Renewal:	R 338797	5/28/64
"Mickey Mouse Club — Show No. C-040"		MP 31678	10/19/77
"Two Chips And A Miss"		LP 1597	3/27/52
"Mickey Mouse Club — Show No. C-044"		MP 31677	10/19/77
"Donald's Better Self"		M1:8248	3/18/38
	Renewal:	R 360676	5/7/65
"Mickey Mouse Club — Show No. C-079"		MP 31683	10/19/77
"Spare The Rod"		LP 3196	2/4/54

106. The foregoing conduct was without the consent of plaintiffs and constituted infringements upon the copyrights and renewal copyrights in said motion pictures and animated cartoons.

107. The said Betamax and Betamax tapes were manufactured for profit by Sony and were sold for profit by Sony America to said retail television outlet for the purpose of having said retail television outlet sell the Betamax and Betamax tapes for profit to purchasers such as James Lowe, with the knowledge and intent that said purchasers would use the Betamax and Betamax tapes to record and copy television shows, including motion pictures produced, copyrighted and owned by plaintiffs. Neither Sony, Sony America, DDBI nor Trigger Enterprises took any steps to police or control the content of the recordings made by James Lowe on said Betamax, although it was within their power to do so.

108. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Plaintiffs do not have in their possession and are unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, plaintiffs are unable to attach copies thereof to this Complaint.

109. Plaintiffs are informed and believe and therefore allege that James Lowe has used his Betamax and Betamax tapes to copy and has copied several other motion pictures owned and copyrighted by plaintiffs.

110. The foregoing acts and conduct of defendants have been without the consent of plaintiffs and constitute infringements of the aforesaid copyrights owned by plaintiffs. As a direct and proximate result of the foregoing acts and conduct of defendants, plaintiffs have been damaged in an amount currently unknown to plaintiffs.

111. Plaintiffs are informed and believe and therefore allege that defendants Sony, Sony America and DDBI, and each of them have derived and received substantial profits from the foregoing wrongful acts and conduct. Plaintiffs are unaware of the exact amount of such profits derived and received by said defendants and plaintiffs will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of plaintiffs, and plaintiffs are entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

112. James Lowe threatens and continues to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe plaintiffs' copyrights in the motion pictures owned and copyrighted by plaintiffs.

113. The acts, conduct and threatened acts and conduct of James Lowe as hereinabove alleged, have caused and are causing, and will continue to cause plaintiffs great and irreparable injury which cannot be adequately compensated or measured in money. Plaintiffs have no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants Sony, Sony America and DDBI are ordered to take reasonable steps to prevent James Lowe from performing the aforesaid acts and conduct.

COUNT X

(By Universal Against Sony, Sony America And DDBI For Copyright Infringement)

114. Universal hereby refers to paragraphs 1, 2, 4, 5, 11, 12C, and paragraphs 14 through 21, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

115. Within the last three years, Mr. and Mrs. Geoffrey Soule purchased a Betamax and Betamax tapes from a retail television outlet known as Arco Discounts, and used them to record and copy, and did record and copy, the following copyrighted motion pictures owned by Universal:

(a) "Horsefeathers"; and

(b) "Duck Soup".

The copyright in said motion pictures was originally secured by, and a Certificate of Registration of a Claim to Copyright issued to, Paramount Publix Corporation and Paramount Productions, Inc., respectively. The aforesaid Certificates of Registration bear the following registration numbers and registration dates:

Title	*Reg. No.*	*Reg. Date*
"Horsefeathers"	L 3209	1932
"Duck Soup"	LL 4246	1933

116. Prior to 1960, EMKA, Ltd. acquired lawful ownership of the aforesaid copyrights and the renewal rights therein.

In 1960, EMKA, Ltd. duly applied for and received a Certificate of Registration of a Claim to Renewal Copyright of the aforesaid motion pictures with the following registration numbers and registration dates:

Title	*Reg. No.*	*Reg. Date*
"Horsefeathers"	R 249564	1/8/60
"Duck Soup"	R 267241	11/25/60

117. Universal has acquired lawful ownership of the aforesaid copyrights and renewal copyrights and is, and at all material times alleged herein, has been the owner of said copyrights and renewal copyrights.

118. The foregoing conduct was without the consent of Universal and constituted infringements upon the copyrights in the aforesaid motion pictures and the renewal copyrights therein.

119. The said Betamax and Betamax tapes were manufactured for profit by Sony and were sold for profit by Sony America to said retail television outlet for the purpose of having the said retail television outlet sell the Betamax and Betamax tapes to purchasers such as Mr. and Mrs. Geoffrey Soule, with the knowledge and intent that said purchasers would use the Betamax and Betamax tapes to record and copy television shows, including motion pictures produced, copyrighted and owned by Universal. Neither Sony, Sony America, DDBI nor said retail television outlet took any steps to police or control the content of the recordings made by Mr. and Mrs. Geoffrey Soule on said Betamax, although it was within their power to do so.

120. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Universal does not have in its possession and is unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, Universal is unable to attach copies thereof to this Complaint.

121. Universal is informed and believes and therefore alleges that Mr. and Mrs. Geoffrey Soule have used their Betamax and Betamax tapes to copy and have copied several other motion pictures owned and copyrighted by Universal. Said copies were made without Universal's consent and constitute infringements upon Universal's said copyrights.

122. The foregoing acts and conduct of defendants have been without the consent of Universal and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, Universal has been damaged in an amount currently unknown to Universal.

123. Universal is informed and believes and therefore alleges that defendants Sony, Sonam and DDBI, and each of them have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by said defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

124. Mr. and Mrs. Geoffrey Soule threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Universal's copyrights in the motion pictures owned and copyrighted by Universal.

125. The acts, conduct and threatened acts and conduct of Mr. and Mrs. Geoffrey Soule as hereinabove alleged, have caused and are causing, and will continue to cause

Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants Sony, Sony America and DDBI are ordered to take reasonable steps to prevent Mr. and Mrs. Geoffrey Soule from performing the aforesaid acts and conduct.

COUNT XI

(By Disney And Universal Against All Defendants For Declaratory Judgment)

126. Plaintiffs hereby refer to paragraphs 1 through 27, 29, 30, 33 through 37, 39, 40, 43 through 47, 49, 50, 53 through 55, 57, 58, 61 through 64, 66, 67, 69 through 76, 79 through 89, 91, 92, 94 through 100, 102, 103, 105A through 110, 112, 113, 115 through 122, 124 and 125 hereinabove and incorporate them, each and all, herein by this reference as though set forth in full.

127. Plaintiffs are informed and believe and therefore allege that the foregoing named purchasers and owners of Betamax and Betamax tapes, and all other purchasers and owners and future purchasers and owners of Betamax and Betamax tapes in the United States, have used, are using, and intend to continue to use their Betamax and Betamax tapes to record and copy off of television, and thereby infringe, copyrighted motion pictures owned by plaintiffs. Defendants Sony, Sony America, DDBI and the retail defendants, and each of them, intend and expect that the purchasers, owners and future purchasers and owners of Betamax and Betamax tapes will use their Betamax and Betamax tapes for such purpose in the future.

128. By reason of the foregoing facts, an actual and justiciable controversy has arisen and now exists between plaintiffs and defendants concerning the rights of defendants

under the Copyright Act of 1909 and the Copyright Revision Act of 1976 (hereinafter the "United States Copyright Laws"), now and in the future, to manufacture, advertise and sell Betamax for use in recording off of television copyrighted motion pictures owned by plaintiffs in that

(a) Plaintiffs contend

(i) that the present and future use of Betamax and Betamax tapes by all present and future owners thereof in the United States to record off of television copyrighted motion pictures owned by plaintiffs is and will continue to be in violation of the United States Copyright Laws and constitutes and will continue to constitute copyright infringement of plaintiffs' copyrights;

(ii) that the present and future manufacture, advertising or sale of Betamax and Betamax tapes throughout the United States to allow present and future purchasers thereof to record off of television in the United States copyrighted motion pictures owned by plaintiffs makes and will continue to make the manufacturers, advertisers, distributors and sellers of Betamax and Betamax tapes civilly liable to plaintiffs for such copyright infringements; and

(iii) that the present and future demonstration of Betamax to the public by the retail defendants in recording off the air and/or playing back copyrighted motion pictures owned by plaintiffs constitutes and will continue to constitute infringement of plaintiffs' copyrights for which defendants are, and will continue to be, civilly liable to plaintiffs.

(b) Defendants dispute and deny plaintiffs' contentions and contend, among other things,

(i) that the use of Betamax and Betamax tapes by persons in the privacy of their homes to record off of television copyrighted motion pictures owned by plaintiffs for personal private use and not for commercial

use does not, and will not in the future, constitute copyright infringement and is, and will continue to be, protected by the doctrine of "fair use" and by the First Amendment to the United States Constitution; and

(ii) that the manufacture, advertising or sale of Betamax to allow purchasers thereof to record off of television copyrighted motion pictures owned by plaintiffs does not, and will not in the future, make the manufacturers, advertisers, distributors and sellers of Betamax and Betamax tapes civilly liable for such copyright infringements.

129. By reason of the claims and contentions made and asserted by plaintiffs and defendants, and because of the public's right to be apprised of the correct state of the law, it is necessary that the rights, duties and obligations of plaintiffs on the one hand and defendants on the other hand with respect to the manufacture, advertising, sale and use of Betamax and Betamax tapes be determined by the Court.

COUNT XII

(By Universal Against All Defendants Except William Griffiths For Violation Of 15 U.S.C. §1125(a))

130. This count was previously dismissed by the Court by Order dated March 28, 1977. It is re-pleaded and re-alleged herein for purposes of preserving Universal's rights on appeal.

131. Universal hereby refers to paragraphs 1 through 26, inclusive, 33 through 36, inclusive, 43 through 46, inclusive, 53 and 54 hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

132. Defendants have failed to advise the public that use of Betamax and Betamax tapes to copy copyrighted motion pictures constitutes copyright infringement and vi-

olates the rights of copyright owners under the Copyright Act. By engaging in the aforesaid acts and conduct, defendants, and each of them, have encouraged, solicited, aided and abetted the misappropriation of and have misappropriated without the consent of Universal valuable property and other rights of Universal.

133. By engaging in the aforesaid acts and conduct, defendants, and each of them, have misled the public and have caused public confusion, and are likely to continue to cause public confusion and to cause public mistake and to deceive and mislead and confuse the public into believing that the sale of Betamax and Betamax tapes as aforesaid for the purpose of making copies of television shows, including motion pictures owned and copyrighted by Universal and others, is with the permission and consent of Universal and other owners of televised copyrighted motion pictures, and that the use of Betamax and Betamax tapes to make copies of said motion pictures, including those owned and copyrighted by Universal, does not and will not violate the law or any rights of any persons, including Universal.

134. By the foregoing acts, defendants, and each of them (with the exception of William Griffiths), have used false designations of origin and false descriptions and representations in connection with the advertisement, sale and distribution of goods in interstate commerce in violation of 15 U.S.C. §1125(a).

135. The foregoing acts and conduct of defendants have been without the consent of Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Universal has been damaged in an amount currently unknown to Universal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

136. Universal is informed and believes and therefore alleges that defendants, and each of them (with the exception of William Griffiths), have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by said defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

137. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove unless restrained and enjoined by this Court from doing so.

138. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

COUNT XIII

(By Disney Against All Defendants Except William Griffiths For Violation Of 15 U.S.C. §1125(a))

139. This count was previously dismissed by the Court by Order dated March 28, 1977. It is re-pleaded and realleged herein for the purpose of preserving Disney's rights on appeal.

140. Disney hereby refers to paragraph 1, and paragraphs 3 through 11, inclusive, 16 through 21, inclusive, and 69 through 72, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

141. Defendants have failed to advise the public that use of Betamax and Betamax tapes to copy copyrighted motion pictures constitutes copyright infringement and violates the rights of the copyright owners under the Copyright Act. By engaging in the aforesaid acts and conduct, defendants, and each of them, have encouraged, solicited, aided and abetted the misappropriation of and have misappropriated without the consent of Disney valuable property and other rights of Disney.

142. By engaging in the aforesaid acts and conduct, defendants, and each of them, have misled the public and have caused public confusion, and are likely to continue to cause public confusion and to cause public mistake and to deceive and mislead and confuse the public into believing that the sale of Betamax and Betamax tapes as aforesaid for the purpose of making copies of television shows, including motion pictures owned and copyrighted by Disney and others, is with the permission and consent of Disney and other owners of televised copyrighted motion pictures, and that the use of Betamax and Betamax tapes to make copies of said motion pictures, including those owned and copyrighted by Disney, does not and will not violate the law or any rights of any persons, including Disney.

143. By the foregoing acts, defendants, and each of them (with the exception of William Griffiths), have used false designations of origin and false descriptions and representations in connection with the advertisement, sale and distribution of goods in interstate commerce in violation of 15 U.S.C. §1125(a).

144. The foregoing acts and conduct of defendants have been without the consent of Disney. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Disney has been damaged in an amount currently unknown to Disney. Disney will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Disney.

145. Disney is informed and believes and therefore alleges that defendants, and each of them (with the exception of William Griffiths), have derived and received substantial profits from the foregoing wrongful acts and conduct. Disney is unaware of the exact amount of such profits derived and received by said defendants and Disney will seek leave to amend this paragraph when the amount of said profits had been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of Disney, and Disney is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

146. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove unless restrained and enjoined by this Court from doing so.

147. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Disney great and irreparable injury which cannot be adequately compensated or measured in money. Disney has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

COUNT XIV

(By Universal Against All Defendants Except William Griffiths For Unfair Competition)

148. Universal hereby refers to paragraphs 1 through 26, inclusive, 33 through 36, inclusive, 43 through 46, inclusive, 53, 54, 81 through 88, 91, 92, 94 through 99, 102, 103, 105A, 106 through 109, 112, 113, 115 through 121, 124, 125, 127, 132, 133, and 135 through 138, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

149. The aforesaid acts and conduct of defendants, and each of them (with the exception of William Griffiths), constitute unfair and fraudulent business practices and unfair competition and a violation of the rights of Universal under federal law, and the common law, and under California Civil Code §3369 and California Business and Professions Code §17500.

COUNT XV

(By Disney Against All Defendants Except William Griffiths For Unfair Competition)

150. Disney hereby refers to paragraph 1, and paragraphs 3 through 12E, inclusive, 16 through 21, inclusive, 69 through 73, inclusive, 79, 80, 85 through 88, 105B through 109, inclusive, 127, 141, 142, and 144 through 147, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

151. The aforesaid acts and conduct of defendants, and each of them (with the exception of William Griffiths), constitute unfair and fraudulent business practices and unfair competition and a violation of the rights of Disney under federal law, and the common law, and under California Civil Code §3369 and California Business and Professions Code §17500.

COUNT XVI

(By Universal Against All Defendants For Intentional Interference With Contractual And Advantageous Business Relationships)

152. Universal hereby refers to paragraphs 1 through 26, inclusive, 33 through 36, inclusive, 43 through 46, inclusive, 53, 54, 81 through 88, 91, 92, 94 through 99, 102, 103, 105A, 106 through 109, 112, 113, 115 through 121, 124, 125, 127, 132 and 133 hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

153. Universal and/or its licensee, MCA Television Limited, a corporation wholly owned by MCA Inc., has entered into and currently has contracts with the major national television networks (i.e., National Broadcasting Company, Inc., Columbia Broadcasting System, Inc. and American Broadcasting Co.) and various independent television stations by which Universal and/or its licensee, MCA Television Limited, has granted said networks and television stations the exclusive right to exhibit many of said motion pictures one or more times on television.

154. Said contracts are the result of longstanding and continuing business dealings between Universal (and/or its licensee, MCA Television Limited) and said television networks and television stations.

155. The aforesaid contracts and business dealings constitute current and prospective valuable and advantageous business relationships of Universal.

156. Universal is informed and believes and therefore alleges that at all times mentioned herein, all defendants knew of the existence of the aforesaid contracts and advantageous business relationships and engaged in the aforesaid acts and conduct with the intent to injure and otherwise

interfere with Universal's aforesaid contractual and advantageous business relationships.

157. Said defendants engaged in the aforesaid acts and conduct without justification and have injured, and interfered, and will in the future injure and interfere, with said contractual and advantageous business relationships and have deprived and will deprive Universal of the full benefits thereof.

158. The aforesaid injury and loss to Universal would not have occurred but for the acts and conduct of said defendants as aforesaid.

159. The foregoing acts and conduct of defendants have been without the consent of Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Universal has been damaged in an amount currently unknown to Universal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

160. Universal is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

161. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set

forth hereinabove unless restrained and enjoined by this Court from doing so.

162. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

COUNT XVII

(By Disney Against All Defendants For Intentional Interference With Contractual And Advantageous Business Relationships)

163. Disney hereby refers to paragraph 1, and paragraphs 3 through 12E, inclusive, 16 through 21, inclusive, 69 through 73, inclusive, 79, 80, 85 through 88, 105B through 109, inclusive, 127, 141 and 142 hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

164. Disney has entered into and currently has contracts with National Broadcasting Company, Inc., and various independent third parties by which Disney has granted said network and third parties the exclusive rights to exhibit many of said motion pictures one or more times on television. Disney (and/or its licensees) has also entered into and currently has contracts with various independent television stations by which said television stations have been granted the exclusive right to exhibit many of said motion pictures one or more times on television.

165. Said contracts are the result of longstanding and continuing business dealings between Disney (and/or its licensees) and said television networks and television stations.

166. The aforesaid contracts and business dealings constitute current and prospective valuable and advantageous business relationships of Disney.

167. Disney is informed and believes and therefore alleges that at all times mentioned herein, all defendants knew of the existence of the aforesaid contracts and advantageous business relationships and engaged in the aforesaid acts and conduct with the intent to injure, destroy and otherwise interfere with Disney's aforesaid contractual and advantageous business relationships.

168. Said defendants engaged in the aforesaid acts and conduct without justification and have injured, and interfered, and in the future will injure and interfere, with said contractual and advantageous business relationships and have deprived, and will deprive, Disney of the full benefits thereof.

169. The aforesaid injury and loss to Disney would not have occurred but for the acts and conduct of said defendants as aforesaid.

170. The foregoing acts and conduct of defendants have been without the consent of Disney. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Disney has been damaged in an amount currently unknown to Disney. Disney will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Disney.

171. Disney is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts

and conduct. Disney is unaware of the exact amount of such profits derived and received by defendants and Disney will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Disney, and Disney is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

172. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove unless restrained and enjoined by this Court from doing so.

173. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Disney great and irreparable injury which cannot be adequately compensated or measured in money. Disney has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

WHEREFORE, plaintiffs pray for judgment against defendants, and each of them, jointly and severally, as follows:

1. That defendants, and each of them, and their respective officers, agents, servants, employees and attorneys, and each of them, and all persons in active concert or participation with them, or any of them, be forthwith temporarily and permanently enjoined and restrained from

(a) manufacturing, distributing, selling or offering for sale Betamax and Betamax tapes for use by purchasers thereof to copy or otherwise infringe copyrighted motion pictures owned by plaintiffs;

(b) using Betamax and Betamax tapes to copy motion pictures owned and copyrighted by plaintiffs;

(c) advertising or in any way representing that Betamax and Betamax tapes may be used for the purpose of making copies of television shows, including motion pictures owned and copyrighted by plaintiffs;

(d) exhibiting or playing all videotape copies made by defendants, and each of them, of motion pictures owned and copyrighted by plaintiffs;

and ordered to take all steps possible (as such steps are specifically defined by the Court) to prevent the use of Betamax and Betamax tapes (which have already been sold in the United States) to record and copy copyrighted motion pictures owned by plaintiffs;

2. That defendants, and each of them, be adjudged to have infringed Universal's copyrights in its motion pictures "Adam 12", "The Sakai Ito Story" (which is an episode of the television series "Major Adams"), "Run Sam, Run" (which is an episode of the television series "Gemini Man"), "Captains And The Kings, Chapter III", "Never Give An Inch" (originally entitled "Sometimes A Great Notion"), "Alpha Caper", "Amelia Earhart", an episode of "Baa Baa Blacksheep" entitled "Presumed Dead", an episode of "Holmes And Yo-Yo" entitled "The Last Phantom", "Frankenstein", "Bride Of Frankenstein", "Son Of Frankenstein", "The Mummy", The Time Of Their Lives", "This Island Earth", "The Wolf Man", "The Mummy's Hand", "Duel", "The House Of Fear", "Horsefeathers", "Duck Soup", two episodes from the "Bionic Woman" television series entitled (a) "Fembots In Las Vegas, Part I" and (b) "Fembots In Las Vegas, Part II", an episode from the "Quincy" television series entitled "Who's Who In Neverland", "Psycho", and such other motion pictures as Universal shall prove at trial to have been copied by defendants and purchasers of Betamax and Betamax tapes;

3. That defendants, and each of them, be adjudged to have infringed Disney's copyrights in its motion pictures "Mickey Mouse Club — Show No. C-001", "Walt Disney Presents — This Is Your Life, Donald Duck", "On Vacation — Fantasyland — Show No. 26" ("On Vacation With Mickey Mouse And Friends"), "Mickey Mouse Club — Show No. C-028" (including the animated cartoon entitled "Fire Chief"), "Mickey Mouse Club — Show No. C-024" (including the animated cartoon entitled "Mickey's Parrot"), "Mickey Mouse Club — Show No. C-026" (including the animated cartoon entitled "Trick Or Treat"), "Mickey Mouse Club — Show No. C-030" (including the animated cartoon entitled "The Tortoise And The Hare"), "Mickey Mouse Club — Show No. C-011" (including the animated cartoon entitled "Clock Cleaners"), "Mickey Mouse Club — Show No. C-082" (including the animated cartoon entitled "The Autograph Hound"), "Mickey Mouse Club — Show No. C-041" (including the animated cartoon entitled "The Pointer"), "Mickey Mouse Club — Show No. C-049" (including the animated cartoon entitled "Hawaiian Holiday"), "Mickey Mouse Club — Show No. C-003" (including the animated cartoon entitled "Donald Applecore"), "Mickey Mouse Club — Show No. C-015" (including the animated cartoon entitled "Pluto's Quinpuplets"), "Mickey Mouse Club — Show No. C-035" (including the animated cartoon entitled "Modern Inventions"), "Mickey Mouse Club — Show No. C-040" (including the animated cartoon entitled "Two Chips And A Miss"), "Mickey Mouse Club — Show No. C-044" (including the animated cartoon entitled "Donald's Better Self"), "Mickey Mouse Club — Show No. C-079" (including the animated cartoon entitled "Spare The Rod"), and such other motion pictures as Disney shall prove at trial

to have been copied by defendants and purchasers of Betamax and Betamax tapes;

4. That defendants, and each of them (with the exception of William Griffiths), be adjudged to have competed unfairly with Universal and engaged in unfair and fraudulent business practices in violation of 15 U.S.C. §§1121, 1125(a), 1126 and the law of California;

5. That defendants, and each of them (with the exception of William Griffiths), be adjudged to have competed unfairly with Disney and engaged in unfair and fraudulent business practices in violation of 15 U.S.C. §§1121, 1125(a), 1126 and the law of California;

6. That defendants, and each of them, be adjudged to have unlawfully and intentionally interfered with the contractual and advantageous business relationships of Universal;

7. That defendants, and each of them, be adjudged to have unlawfully and intentionally interfered with the contractual and advantageous business relationships of Disney;

8. For damages suffered by plaintiffs according to proof adduced at trial;

9. For the profits received by defendants, and each of them, as a result of the acts and conduct of said defendants alleged in this Complaint, and for an accounting from defendants, and each of them, to determine said profits;

10. That defendants, and each of them, be required to deliver to the United States Marshal to be impounded during the pendency of this action all copies of copyrighted motion pictures owned by plaintiffs, or portions thereof;

11. That defendants, and each of them, be required to deliver up on oath for destruction all infringing copies of copyrighted motion pictures owned by plaintiffs;

11A. For a declaration in accord with plaintiffs' contentions set forth in Count XI above, including a declaration that (a) the use of Betamax and Betamax tapes to record off of television copyrighted motion pictures owned by plaintiffs is in violation of the United States Copyright Laws and constitutes copyright infringement, and that the manufacturers, advertisers, distributors and sellers of Betamax and Betamax tapes are civilly liable for such infringements, and (b) the demonstration of Betamax to the public by the retail defendants in recording off the air and playing back copyrighted motion pictures owned by plaintiffs constitutes and will continue to constitute infringement of plaintiffs' copyrights for which defendants are, and will continue to be, civilly liable to plaintiffs;

12. For costs of suit, including reasonable attorneys' fees, incurred herein; and

13. For such other and further relief as to the Court may seem just and proper pursuant to Federal Rules of Civil Procedure, Rule 54(c).

Dated: November 9, 1977.

ROSENFELD, MEYER & SUSMAN
STEPHEN A. KROFT
JOHN G. DAVIES
By /s/ Stephen A. Kroft
STEPHEN A. KROFT
Attorneys for Plaintiffs

(Certificate of service omitted in printing)

Order Re Dismissing and Striking From First Supplemental and Amended Complaint.

United States District Court Central District of California.

(Title omitted in printing).

No. CV 76 3520 F.

Filed: February 22, 1978.

The motion of defendants to dismiss, and for more definite statement, re First Supplemental and Amended Complaint, filed December 19, 1977, came on regularly for hearing before the Court on Monday, January 30, 1978, the Honorable Warren J. Ferguson, Judge presiding, and the plaintiffs having appeared by their counsel, Rosenfeld, Meyer & Susman and Stephen A. Kroft, Esq., and defendants Sony Corporation ("Sony") and Sony Corporation of America ("Sonam") and Doyle Dane Bernbach, Inc. ("DDBI") having appeared by their counsel, Gibson, Dunn & Crutcher and Dean C. Dunlavey, Esq. and Donald E. Sloan, Esq., and the retail store defendants having appeared by their counsel, Rutter & Ebbert and Marshall A. Rutter, Esq., and the Court having considered the motion, and all papers and documents filed by the parties in support of and in opposition thereto, and the Court having heard argument of counsel, and good cause appearing therefor,

IT HEREBY IS ORDERED that:

1. Counts XII and XIII in the First Supplemental and Amended Complaint (being Counts VII and VIII in the original complaint) hereby are dismissed.

2. Counts IV and VI in the First Supplemental and Amended Complaint hereby are dismissed without prejudice, but they shall not be raised in this case.

3. Those references in the First Supplemental and Amended Complaint to unknown infringements, unknown infringers and/or unknown damages (viz., in paragraphs 22,

24, 26, 27, 34, 36, 37, 44, 46, 47, 53-55, 64, 71-73, 88, 89, 99, 100, 109, 110, 121, 122, 127, 159 and 170) are stricken without prejudice, but may not be raised in this trial. This order does not preclude plaintiffs from bringing a motion to amend the First Supplemental and Amended Complaint by making a more definite statement as to specific infringements, infringers and/or damages, but any such amendment may result in continuance of the trial date.

4. Defendants' motion to dismiss Count XI is denied, without prejudice to being renewed at the conclusion of the trial, except that this Count may not be used to obtain an advisory opinion, there has to be a case or controversy, and the Count will be limited to facts of actual infringement presented at the trial.

5. Defendants' motion to dismiss Counts XIV through XVII is denied without prejudice to being renewed at the end of the trial.

DATED this 22 day of February, 1978.

/s/ Warren J. Ferguson
United States District Judge

RECEIVED AND APPROVED
AS TO FORM:
ROSENFELD, MEYER & SUSMAN
By /s/ John G. Davies

Answer of Defendants Sony Corporation of America, Sony Corporation and Doyle Dane Bernbach, Inc. to First Supplemental and Amended Complaint.

United States District Court Central District of California.

(Title omitted in printing).

No. CV 76 3520 F.

Filed: March 6, 1978.

Each of defendants Sony Corporation of America ("Sony America"), Sony Corporation ("Sony") and Doyle Dane Bernbach, Inc. ("DDBI"), answering the First Supplemental and Amended Complaint ("complaint") for itself alone, admits, denies and alleges as follows:*

1. Answering Paragraph 1, admits that plaintiffs purport to maintain this action for copyright infringement, unfair competition, intentional interference with contractual and advantageous business relationships, and declaratory judgment, and that plaintiffs have asserted jurisdiction is conferred by the statutes cited therein and by the doctrine of pendent jurisdiction; admits that Counts XIV, XV, XVI and XVII are based on substantially the same facts as Counts I through XIII. Except as hereinabove specifically admitted, denies each and every averment thereof.

2. Answering Paragraphs 2 and 3, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

3. Answering Paragraph 4, admits each and every averment thereof.

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*Counts IV, VI, XII and XIII have been dismissed from the First Supplemental and Amended Complaint, and all references to unknown infringements, unknown infringers and/or unknown damages have been stricken therefrom (viz., in paragraphs 22, 24, 26, 27, 34, 36, 37, 44, 46, 47, 53-55, 64, 71-73, 88, 89, 99, 100, 109, 110, 121, 122, 127, 159 and 170), and accordingly no answer is made to any of the foregoing.

4. Answering Paragraph 5, admits that Sony, erroneously sued and served herein as "The Sony Corporation", was and is a corporation duly organized and existing under the laws of the country of Japan. Except as hereinabove specifically admitted, denies each and every averment thereof.

5. Answering Paragraphs 6, 7, 8 and 9, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

6. Answering Paragraph 10, admits each and every averment thereof.

7. Answering Paragraph 11, denies each and every averment thereof.

8. Answering Paragraphs 12A through 12E, inclusive, admits each and every averment thereof.

ANSWER TO COUNT I

9. Answering Paragraph 13, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

10. Answering Paragraphs 14 and 15, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

11. Answering Paragraph 16, admits that Sony presently is manufacturing a videotape recording machine known as "Betamax" and other videotape recording machines, and that the videotape recording machines manufactured by Sony and sold under the name "Betamax" have included those designated as model Nos. SL-7200, SL-8200, SLO-260 and LV-1901. Except as hereinabove specifically admitted, denies each and every averment thereof.

12. Answering Paragraphs 17 and 18, admits each and every averment thereof.

13. Answering Paragraph 19, denies each and every averment thereof.

14. Answering Paragraph 20, admits that Sony America and DDBI have produced and caused to be communicated to the public televised, sound recorded and printed advertisements and brochures in the United States for the purpose of selling Betamax and Betamax tapes, and that Exhibit A to the complaint is an example of such advertising. Except as hereinabove specifically admitted, denies each and every averment thereof.

15. Answering Paragraph 20A and 21, denies each and every averment thereof.

16. Answering Paragraph 22, denies each and every averment contained in the last sentence thereof; admits that plaintiffs' agent states that on October 1, 1976 he induced Carter Hawley to play back for him alone a pre-recorded portion of an "Adam 12" episode. Except as hereinabove specifically admitted and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

17. Answering Paragraph 23, denies each and every averment contained in the last sentence thereof; admits that plaintiffs' agent states that on October 18, 1976 he induced Carter Hawley to videotape and play back for him alone a portion of a "Major Adams" episode. Except as hereinabove specifically admitted and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

18. Answering Paragraph 25, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

19. Answering Paragraphs 28, 29, 30 and 31, denies each and every averment thereof.

ANSWER TO COUNT II

20. Answering Paragraph 32, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

21. Answering Paragraph 33, denied each and every averment contained in the last sentence thereof; admits that plaintiffs' agent states that on October 14, 1976 he induced Associated/Robinson to videotape and play back for him alone a portion of a "Gemini Man" episode, which had not been registered for statutory copyright. Except as hereinabove specifically admitted and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

22. Answering Paragraph 35, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

23. Answering Paragraphs 38, 39, 40 and 41, denies each and every averment thereof.

ANSWER TO COUNT III

24. Answering Paragraph 42, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

25. Answering Paragraph 43, denies each and every averment contained in the last sentence thereof; admits that plaintiffs' agent states that on October 14, 1976 he induced Federated/Bullock's to videotape for him alone a portion of "Captains and The Kings, Chapter III", which had not been registered for statutory copyright. Except as hereinabove specifically admitted and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

26. Answering Paragraph 45, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

27. Answering Paragraphs 48, 49, 50 and 51, denies each and every averment thereof.

ANSWER TO COUNT V

28. Answering Paragraph 60, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

29. Answering Paragraphs 61, 61A, 61B and 61C, admits that Griffiths states that he videotaped off-the-air with a Betamax for personal use at home part or all of "Never Give an Inch", of "Alpha Caper", of "Amelia Earhart", of an episode of "Baa Baa Blacksheep" and of an episode of "Holmes and Yo-Yo", some of which had not been registered for statutory copyright, and that he has erased "Alpha Caper" and "Amelia Earhart" and would have erased the others except for the request of plaintiffs' attorney that he not do so; denies that the alleged conduct was without the consent of Universal or Newman-Foreman and constitutes infringement of the copyright in any said motion picture; denies that this defendant has any power to police or control the content of videotaping done by Griffiths. Except as hereinabove specifically denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

30. Answering Paragraph 62, alleges that Universal has some of the tapes recorded by Griffiths. Except as hereinabove specifically alleged, states that it is without knowl-

edge or information sufficient to form a belief as to the truth of each and every averment thereof.

31. Answering Paragraphs 64 (first sentence), 65, 66 and 67, denies each and every averment thereof.

ANSWER TO COUNT VII

32. Answering Paragraph 78, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

33. Answering Paragraphs 79 through 86, inclusive, admits that Marc Wielage states that he videotaped off-the-air with a Betamax for personal use at home part or all of "The New Mickey Mouse Club" (pilot), "Fire Chief", "Mickey's Parrot", "Trick or Treat", "The Tortoise and the Hare", "Clock Cleaners", "The Autograph Hound", "The Pointer", "Hawaiian Holiday", "Frankenstein", "Bride of Frankenstein", "Son of Frankenstein", "The Mummy", "The Time of Their Lives", "This Island Earth", "The Wolf Man", "The Mummy's Hand" and "Duck Soup", some of which had not been registered for statutory copyright, and that he videotaped from ¼" videotape with a Betamax for personal use at home part or all of "This Is Your Life, Donald Duck", "On Vacation With Mickey Mouse and Friends", "The House of Fear" and "Horsefeathers"; denies that the alleged conduct was without the consent of plaintiffs and constitutes infringement of the copyright or renewal copyright in any said motion picture; denies that this defendant has any power to police or control the content of videotaping done by Wielage. Except as hereinabove specifically admitted and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

34. Answering Paragraph 87, alleges that plaintiffs have some of the tapes recorded by Wielage. Except as hereinabove specifically alleged, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

35. Answering Paragraphs 90, 91 and 92, denies each and every averment thereof.

ANSWER TO COUNT VIII

36. Answering Paragraph 93, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

37. Answering Paragraphs 94 through 97, inclusive, admits that Mr. and Mrs. Clinton Bird state they videotaped off-the-air with a Betamax for personal use at home part or all of two episodes from "Bionic Woman" which had not been registered for statutory copyright and that they would have erased said tapes after one playback except for the request of plaintiffs' attorney that they not do so; alleges that Mr. and Mrs. Bird state that they do not recall recording an episode from "Quincy" and that they have erased it if they did so; denies that the alleged conduct was without the consent of Universal and constitutes infringement of the copyright in any said motion picture; denies that this defendant has any power to police or control the content of videotaping done by Mr. or Mrs. Clinton Bird. Except as hereinabove specifically admitted, alleged and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

38. Answering Paragraph 98, alleges that Universal has the tapes recorded by Mr. and Mrs. Bird. Except as hereinabove specifically alleged, states that it is without knowl-

edge or information sufficient to form a belief as to the truth of each and every averment thereof.

39. Answering Paragraphs 101, 102 and 103, denies each and every averment thereof.

ANSWER TO COUNT IX

40. Answering Paragraph 104, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

41. Answering Paragraphs 105A through 107, inclusive, admits that James Lowe states that he or his 13 year old son videotaped off-the-air with a Betamax for personal use at home part or all of "Psycho", "Donald Applecore", "Pluto's Quinpuplets", "Modern Inventions", "Two Chips and A Miss", "Donald's Better Self" and "Spare The Rod", all of which (except "Psycho") were included within a program which had not been registered for statutory copyright, and that he will comply with the request of plaintiffs' counsel not to erase them; denies that the alleged conduct was without the consent of plaintiffs and constitutes infringement of the copyright in any said motion picture; denies that this defendant has any power to police or control the content of videotaping done by James Lowe. Except as hereinabove specifically admitted and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

42. Answering Paragraph 108, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

43. Answering Paragraphs 111, 112 and 113, denies each and every averment thereof.

ANSWER TO COUNT X

44. Answering Paragraph 114, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

45. Answering Paragraphs 115 through 119, inclusive, admits that Mr. Geoffrey Soule states that he videotaped off-the-air with a Betamax for personal use at home part or all of "Horsefeathers" and "Duck Soup", neither of which has been played back, and that he did not erase them because of plaintiffs' subpoena; denies that the alleged conduct was without the consent of Universal and constitutes infringement of the copyright in any said motion picture; denies that this defendant has any power to police or control the content of videotaping done by Mr. or Mrs. Geoffrey Soule. Except as hereinabove specifically admitted and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

46. Answering Paragraph 120, alleges that Universal has the tapes recorded by Mr. Soule. Except as hereinabove specifically alleged, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

47. Answering Paragraphs 123, 124 and 125, denies each and every averment thereof.

ANSWER TO COUNT XI

48. Answering Paragraph 126, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

49. Answering Paragraph 128, admits that Paragraph (b) recites some of defendants' contentions. Except as here-

inabove specifically admitted, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

50. Answering Paragraph 129, denies each and every averment thereof.

ANSWER TO COUNT XIV

51. Answering Paragraph 148, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

52. Answering Paragraph 149, denies each and every averment thereof.

ANSWER TO COUNT XV

53. Answering Paragraph 150, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

54. Answering Paragraph 151, denies each and every averment thereof.

ANSWER TO COUNT XVI

55. Answering Paragraph 152, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

56. Answering Paragraphs 153, 154 and 155, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

57. Answering Paragraphs 156 through 159 (first sentence) and 160 through 162, inclusive, denies each and every averment thereof.

ANSWER TO COUNT XVII

58. Answering Paragraph 163, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

59. Answering Paragraphs 164, 165 and 166, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

60. Answering Paragraphs 167 through 170 (first sentence) and 171 through 173, inclusive, denies each and every averment thereof.

FOR A FURTHER, SEPARATE, AND SECOND DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

61. The complaint, and each count therein, fails to state a claim against any of these answering defendants upon which relief can be granted.

FOR A FURTHER, SEPARATE, AND THIRD DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

62. Plaintiffs have caused the motion pictures in issue to be transmitted into the homes of members of the public in programs of television stations broadcast over the public airwaves.

63. The use of Betamax and Betamax tapes by members of the public to videotape programs transmitted into their homes over the public airwaves (viz., off-the-air), for their private use and not for any commercial use, is not an infringement of any copyrighted material incorporated in such programs. Such use is a fair use of such copyrighted material.

FOR A FURTHER, SEPARATE, AND FOURTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

64. Paragraph 62 of this answer is incorporated herein with the same force and effect as if herein set forth in full.

65. The right of members of the public to receive and to videotape, in the privacy of their homes and for their private use and not for any commercial use, communications transmitted into their homes over the public airwaves is protected by public policy and by the First Amendment to the Constitution of the United States. No copyright statute prohibits such use of broadcast communications and, if it were construed to prohibit such use, the statute as so applied would be unconstitutional.

FOR A FURTHER, SEPARATE, AND FIFTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

66. Paragraph 62 of this answer is incorporated herein with the same force and effect as if herein set forth in full.

67. Plaintiffs have consented, both in law and fact, to the home videotaping thereof by members of the public for private non-commercial use.

FOR A FURTHER, SEPARATE, AND SIXTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

68. Videotape machines and tapes are useful articles of commerce by which members of the public may and do receive and videotape communications of many kinds other than the motion pictures referred to in the complaint.

69. The rights to own, use, sell, promote and advertise such machines and tapes are valuable property rights, interference with which by governmental action would violate

public policy, the First Amendment and the due process clause of the Fifth Amendment to the Constitution of the United States. No copyright statute authorizes such interference and, if it were construed to do so, the statute as so applied would be unconstitutional.

FOR A FURTHER, SEPARATE, AND SEVENTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

70. Plaintiffs are barred by laches and estoppel from any recovery in this action.

FOR A FURTHER, SEPARATE, AND EIGHTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

71. Each count of the complaint involving defendant Griffiths has been improperly or collusively made or joined to invoke the jurisdiction of this Court, in that Griffiths, among other things, is a client of plaintiffs' law firm, has been sued with his permission and has no interest in whether defendants win or lose this lawsuit, does not intend to become involved or to be represented by counsel, and has received from plaintiffs a waiver of any claim for damages or costs for the infringements alleged in the complaint. Each count of the complaint involving defendant Griffiths does not constitute a genuine dispute or case or controversy within the jurisdiction of this Court. This Court has no jurisdiction of this civil action or of any count in the complaint involving defendant Griffiths.

FOR A FURTHER, SEPARATE, AND NINTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

72. Each alleged act of infringement in each count of the complaint involving each of defendants Federated Department Stores, Inc. (Bullocks), Carter Hawley Hale

Stores, Inc. (Broadway) and Associated Dry Goods Corporation (J. W. Robinson) was requested, induced and consented to by plaintiffs and each of them. Plaintiffs and each of them are estopped to complain of any said alleged act of infringement. Each count of the complaint involving any of said defendants does not constitute a genuine dispute or case or controversy within the jurisdiction of this Court.

FOR A FURTHER, SEPARATE, AND TENTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

73. Plaintiff Universal is a wholly-owned subsidiary of MCA, Inc. ("MCA"). MCA is a corporation which asserts that for years it has participated in the development of, and that it is participating in the preparations to sell in the United States, a videodisc system consisting of a videodisc machine and professionally pre-recorded videodiscs to be used therewith. MCA asserts that, through its Disco-Vision division, it is manufacturing prerecorded videodiscs containing material furnished by Universal and others.

74. MCA asserts that it believes its videodisc system will be in competition with the Betamax system. MCA asserts that it believes its videodisc machine and professionally prerecorded videodiscs can be made and sold for less than the Betamax and professionally pre-recorded Betamax tapes, respectively, and believes that this will be a competitive advantage vis-a-vis the Betamax system: but MCA's videodisc system does not have any recording capability and MCA asserts that it believes this is a competitive disadvantage vis-a-vis the Betamax system.

75. In the latter part of 1976, believing that the videodisc system would soon be marketed, MCA and Universal commenced a course of unfair and inequitable conduct (as described hereinafter) intended to restrain Sony and Sony

America from marketing the Betamax system with its off-the-air recording capability.

76. Disney had expressed to MCA an interest in pre-recording Disney's copyrighted motion pictures on MCA's videodiscs and, as an initial step in furtherance of Universal's and MCA's aforesaid course of unfair and inequitable conduct, Universal and MCA solicited Disney to join them in their attempt to restrain marketing of the Betamax system with its off-the-air recording capability. Disney agreed, and MCA, Universal and Disney thereupon combined and conspired to pool and use plaintiffs' copyrights, not for the professed purpose of protecting the value of plaintiffs' copyrighted motion pictures, but rather for the ulterior purpose of restraining Sony and Sony America from marketing the Betamax system with its off-the-air recording capability and thereby of eliminating the Betamax system from the United States home video market in an attempt to preempt that market for the videodisc system.

77. In furtherance of said combination and conspiracy and course of unfair and inequitable conduct, Universal and Disney have done at least the following, involving a misuse of their copyrights:

(a) plaintiffs refuse to license their copyrighted motion pictures for professional pre-recording on Betamax tapes, with the intent thereby of restraining competition by the Betamax system;

(b) plaintiffs and MCA have told other movie studios, owners of copyrighted motion pictures and others in the entertainment industry what plaintiffs are doing, and have solicited said entities to do likewise and to otherwise support plaintiffs' position herein;

(c) plaintiffs and MCA have stated to the public that the consumer's use of the Betamax system to record plain-

tiffs' motion pictures for home use constitutes a "stealing" of plaintiffs' motion pictures;

(d) plaintiffs and MCA threatened Sony and Sony America with this lawsuit unless Sony withdrew from the consumer videotape recording business;

(e) plaintiffs filed this action, based solely on collusive and induced alleged infringements, not for the professed purpose of protecting the value of their copyrighted motion pictures, but rather for the purpose of removing any competitive advantage of the Betamax system over the videodisc system by removing the Betamax system's capability of recording telecasts off-the-air;

(f) plaintiffs and MCA have used and are using this lawsuit and its attendant publicity unreasonably to restrain competition in the United States home video market.

78. By reason of the foregoing, plaintiffs, and each of them, thus have come to this Court with unclean hands and are barred from asserting any of the purported causes of action alleged in the complaint.

FOR A FURTHER, SEPARATE, AND ELEVENTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

79. Paragraphs 73 through 77, inclusive, of this Answer are incorporated herein with the same force and effect as if herein set forth in full.

80. The relevant product market involved here consists of the home video market, comprised of home use videotape systems and videodisc systems. The relevant geographic market involved here consists of the United States (viz., all areas where United States copyright laws are in effect).

81. Plaintiffs have misused and are misusing their copyrights in furtherance of a combination and conspiracy unreasonably to restrain and monopolize trade and commerce,

and as a part of an attempt to monopolize trade and commerce, by eliminating Sony's Betamax system from the United States home video market in order to preempt that market for videodisc machines and professionally prerecorded videodiscs.

82. By reason of the foregoing, plaintiffs' copyrights are unenforceable and each of the purported causes of action alleged in the complaint cannot be maintained.

WHEREFORE, each defendant prays for judgment in this action as follows:

1. That the complaint be dismissed with prejudice.

2. That these defendants, and each of them, have and recover their costs and reasonable attorneys' fees incurred herein.

3. For such other and further relief as to the Court may seem just and proper.

GIBSON, DUNN & CRUTCHER
DEAN C. DUNLAVEY
By /s/ Dean C. Dunlavey
DEAN C. DUNLAVEY
Attorneys for Defendants

(Certificate of service omitted in printing)

Answer of Defendants Carter Hawley Hale Stores, Inc., Associated Dry Goods Corporation, Federated Department Stores, Inc. and Henry's Camera Corporation to First Supplemental and Amended Complaint.

United States District Court Central District of California.

(Title omitted in printing).

No. CV 76 3520 F.

Filed: March 6, 1978.

Each of defendants Carter Hawley Hale Stores, Inc. ("Carter Hawley"), Associated Dry Goods Corporation ("Associated/Robinson"), Federated Department Stores, Inc. ("Federated/Bullock's") and Henry's Camera Corporation ("Henry's Camera"), answering for itself alone those allegations in the First Supplemental and Amended Complaint ("complaint") which pertain to it, admits, denies and alleges as follows:*

1. Answering Paragraph 1, admits that plaintiffs purport to maintain this action for copyright infringement, unfair competition, intentional interference with contractual and advantageous business relationships, and declaratory judgment, and that plaintiffs have asserted jurisdiction is conferred by the statutes cited therein and by the doctrine of pendent jurisdiction; admits that Counts XIV, XV, XVI and XVII are based on substantially the same facts as Counts I through XIII. Except as hereinabove specifically admitted, denies each and every averment thereof.

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*Counts IV, VI, XII and XIII have been dismissed from the First Supplemental and Amended Complaint, and all references to unknown infringements, unknown infringers and/or unknown damages have been stricken therefrom (viz., in paragraphs 22, 24, 26, 27, 34, 36, 37, 44, 46, 47, 53-55, 64, 71-73, 88, 89, 99, 100, 109, 110, 121, 122, 127, 159 and 170), and accordingly no answer is made to any of the foregoing.

2. Answering Paragraphs 2 and 3, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

3. Answering Paragraph 4, admits each and every averment thereof.

4. Answering Paragraph 5, admits that Sony, erroneously sued and served herein as "The Sony Corporation", was and is a corporation duly organized and existing under the laws of the country of Japan. Except as hereinabove specifically admitted, denies each and every averment thereof.

5. Answering Paragraphs 6, 7, 8 and 9, denies that either Associated/Robinson or Federated/Bullocks has its principal place of business in Los Angeles, California. Except as hereinabove specifically denied, admits each and every averment thereof.

6. Answering Paragraph 10, admits each and every averment thereof.

7. Answering Paragraph 11, denies each and every averment thereof.

8. Answering Paragraphs 12A through 12E, inclusive, admits each and every averment thereof.

ANSWER TO COUNT I

9. Answering Paragraph 13, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

10. Answering Paragraphs 14 and 15, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

11. Answering Paragraph 16, admits that Sony presently is manufacturing a videotape recording machine

known as "Betamax" and other videotape recording machines, and that the videotape recording machines manufactured by Sony and sold under the name "Betamax" have included those designated as model Nos. SL-7200, SL-8200, SLO-260 and LV-1901. Except as hereinabove specifically admitted, denies each and every averment thereof.

12. Answering Paragraphs 17 and 18, admits each and every averment thereof.

13. Answering Paragraph 19, denies each and every averment thereof.

14. Answering Paragraph 20, admits that Sony America and DDBI have produced and caused to be communicated to the public televised, sound recorded and printed advertisements and brochures in the United States for the purpose of selling Betamax and Betamax tapes, and that Exhibit A to the complaint is an example of such advertising. Except as hereinabove specifically admitted, denies each and every averment thereof.

15. Answering Paragraphs 20A and 21, denies each and every averment thereof.

16. Answering Paragraph 22, denies each and every averment contained in the last sentence thereof; admits that plaintiffs' agent states that on October 1, 1976 he induced Carter Hawley to play back for him alone a pre-recorded portion of an "Adam 12" episode. Except as hereinabove specifically admitted and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

17. Answering Paragraph 23, denies each and every averment contained in the last sentence thereof; admits that plaintiffs' agent states that on October 18, 1976 he induced Carter Hawley to videotape and play back for him alone a

portion of a "Major Adams" episode. Except as hereinabove specifically admitted and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

18. Answering Paragraph 25, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

19. Answering Paragraphs 28, 29, 30 and 31, denies each and every averment thereof.

ANSWER TO COUNT II

20. Answering Paragraph 32, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

21. Answering Paragraph 33, denies each and every averment contained in the last sentence thereof; admits that plaintiffs' agent states that on October 14, 1976 he induced Associated/Robinson to videotape and play back for him alone a portion of a "Gemini Man" episode, which had not been registered for statutory copyright. Except as hereinabove specifically admitted and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

22. Answering Paragraph 35, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

23. Answering Paragraphs 38, 39, 40 and 41, denies each and every averment thereof.

ANSWER TO COUNT III

24. Answering Paragraph 42, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

25. Answering Paragraph 43, denies each and every averment contained in the last sentence thereof; admits that plaintiffs' agent states that on October 14, 1976 he induced Federated/Bullock's to videotape for him alone a portion of "Captains and The Kings, Chapter III", which had not been registered for statutory copyright. Except as hereinabove specifically admitted and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

26. Answering Paragraph 45, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

27. Answering Paragraphs 48, 49, 50 and 51, denies each and every averment thereof.

ANSWER TO COUNT V

28. Answering Paragraph 60, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

29. Answering Paragraphs 61, 61A, 61B and 61C, admits that Griffiths states that he videotaped off-the-air with a Betamax for personal use at home part or all of "Never Give an Inch", of "Alpha Caper," of "Amelia Earhart", of an episode of "Baa Baa Blacksheep" and of an episode of "Holmes and Yo-Yo", some of which had not been registered for statutory copyright, and that he has erased "Alpha Caper" and "Amelia Earhart" and would have erased the others except for the request of plaintiffs' attorney that he not do so; denies that the alleged conduct was without the consent of Universal or Newman-Foreman and constitutes infringement of the copyright in any said motion picture; denies that this defendant has any power to police or control the content of videotaping done by Griffiths. Except

as hereinabove specifically denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

30. Answering Paragraph 62, alleges that Universal has some of the tapes recorded by Griffiths. Except as hereinabove specifically alleged, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

31. Answering Paragraphs 64 (first sentence), 65, 66 and 67, denies each and every averment thereof.

ANSWER TO COUNT VIII

36. Answering Paragraph 93, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

37. Answering Paragraphs 94 through 97, inclusive, admits that Mr. and Mrs. Clinton Bird state they videotaped off-the-air with a Betamax for personal use at home part or all of two episodes from "Bionic Woman" which had not been registered for statutory copyright and that they would have erased said tapes after one playback except for the request of plaintiffs' attorney that they not do so; alleges that Mr. and Mrs. Bird state that they do not recall recording an episode from "Quincy" and that they have erased it if they did so; denies that the alleged conduct was without the consent of Universal and constitutes infringement of the copyright in any said motion picture; denies that this defendant has any power to police or control the content of videotaping done by Mr. or Mrs. Clinton Bird. Except as hereinabove specifically admitted, alleged and denied, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

38. Answering Paragraph 98, alleges that Universal has the tapes recorded by Mr. and Mrs. Bird. Except as hereinabove specifically alleged, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

39. Answering Paragraphs 101, 102 and 103, denies each and every averment thereof.

ANSWER TO COUNT XI

48. Answering Paragraph 126, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

49. Answering Paragraph 128, admits that Paragraph (b) recites some of defendants' contentions. Except as hereinabove specifically admitted, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

50. Answering Paragraph 129, denies each and every averment thereof.

ANSWER TO COUNT XIV

51. Answering Paragraph 148, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

52. Answering Paragraph 149, denies each and every averment thereof.

ANSWER TO COUNT XV

53. Answering Paragraph 150, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

54. Answering Paragraph 151, denies each and every averment thereof.

ANSWER TO COUNT XVI

55. Answering Paragraph 152, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

56. Answering Paragraphs 153, 154 and 155, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

57. Answering Paragraphs 156 through 159 (first sentence) and 160 through 162, inclusive, denies each and every averment thereof.

ANSWER TO COUNT XVII

58. Answering Paragraph 163, incorporates herein (with the same force and effect as if herein set forth in full) its answer to each paragraph of the complaint incorporated therein.

59. Answering Paragraphs 164, 165 and 166, states that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment thereof.

60. Answering Paragraphs 167 through 170 (first sentence) and 171 through 173, inclusive, denies each and every averment thereof.

FOR A FURTHER, SEPARATE, AND SECOND DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

61. The complaint, and each count therein, fails to state a claim against any of these answering defendants upon which relief can be granted.

FOR A FURTHER, SEPARATE, AND THIRD DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

62. Plaintiffs have caused the motion pictures in issue to be transmitted into the homes of members of the public in programs of television stations broadcast over the public airwaves.

63. The use of Betamax and Betamax tapes by members of the public to videotape programs transmitted into their homes over the public airwaves (viz., off-the-air), for their private use and not for any commercial use, is not an infringement of any copyrighted material incorporated in such programs. Such use is a fair use of such copyrighted material.

FOR A FURTHER, SEPARATE, AND FOURTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

64. Paragraph 62 of this answer is incorporated herein with the same force and effect as if herein set forth in full.

65. The right of members of the public to receive and to videotape, in the privacy of their homes and for their private use and not for any commercial use, communications transmitted into their homes over the public airwaves is protected by public policy and by the First Amendment to the Constitution of the United States. No copyright statute prohibits such use of broadcast communications and, if it were construed to prohibit such use, the statute as so applied would be unconstitutional.

FOR A FURTHER, SEPARATE, AND FIFTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

66. Paragraph 62 of this answer is incorporated herein with the same force and effect as if herein set forth in full.

67. Plaintiffs have consented, both in law and fact, to the home videotaping thereof by members of the public for private non-commercial use.

FOR A FURTHER, SEPARATE, AND SIXTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

68. Videotape machines and tapes are useful articles of commerce by which members of the public may and do receive and videotape communications of many kinds other than the motion pictures referred to in the complaint.

69. The rights to own, use, sell, promote and advertise such machines and tapes are valuable property rights, interference with which by governmental action would violate public policy, the First Amendment and the due process clause of the Fifth Amendment to the Constitution of the United States. No copyright statute authorizes such interference and, if it were construed to do so, the statute as so applied would be unconstitutional.

FOR A FURTHER, SEPARATE, AND SEVENTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

70. Plaintiffs are barred by laches and estoppel from any recovery in this action.

FOR A FURTHER, SEPARATE, AND EIGHTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

71. Each count of the complaint involving defendant Griffiths has been improperly or collusively made or joined to invoke the jurisdiction of this Court, in that Griffiths, among other things, is a client of plaintiffs' law firm, has been sued with his permission and has no interest in whether defendants win or lose this lawsuit, does not intend to become involved or to be represented by counsel, and has received from plaintiffs a waiver of any claim for damages or costs for the infringements alleged in the complaint. Each count of the complaint involving defendant Griffiths does

not constitute a genuine dispute or case or controversy within the jurisdiction of this Court. This Court has no jurisdiction of this civil action or of any count in the complaint involving defendant Griffiths.

FOR A FURTHER, SEPARATE, AND NINTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

72. Each alleged act of infringement in each count of the complaint involving each of defendants Federated Department Stores, Inc. (Bullocks), Carter Hawley Hale Stores, Inc. (Broadway) and Associated Dry Goods Corporation (J. W. Robinson) was requested, induced and consented to by plaintiffs and each of them. Plaintiffs and each of them are estopped to complain of any said alleged act of infringement. Each count of the complaint involving any of said defendants does not constitute a genuine dispute or case or controversy within the jurisdiction of this Court.

FOR A FURTHER, SEPARATE, AND TENTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

73. Plaintiff Universal is a wholly-owned subsidiary of MCA, Inc. ("MCA"). MCA is a corporation which asserts that for years it has participated in the development of, and that it is participating in the preparations to sell in the United States, a videodisc system consisting of a videodisc machine and professionally pre-recorded videodiscs to be used therewith. MCA asserts that, through its Disco-Vision division, it is manufacturing prerecorded videodiscs containing material furnished by Universal and others.

74. MCA asserts that it believes its videodisc system will be in competition with the Betamax system. MCA asserts that it believes its videodisc machine and professionally pre-recorded videodiscs can be made and sold for

less than the Betamax and professionally pre-recorded Betamax tapes, respectively, and believes that this will be a competitive advantage vis-a-vis the Betamax system; but MCA's videodisc system does not have any recording capability and MCA asserts that it believes this is a competitive disadvantage vis-a-vis the Betamax system.

75. In the latter part of 1976, believing that the videodisc system would soon be marketed, MCA and Universal commenced a course of unfair and inequitable conduct (as described hereinafter) intended to restrain Sony and Sony America from marketing the Betamax system with its off-the-air recording capability.

76. Disney had expressed to MCA an interest in pre-recording Disney's copyrighted motion pictures on MCA's videodiscs and, as an initial step in furtherance of Universal's and MCA's aforesaid course of unfair and inequitable conduct, Universal and MCA solicited Disney to join them in their attempt to restrain marketing of the Betamax system with its off-the-air recording capability. Disney agreed, and MCA, Universal and Disney thereupon combined and conspired to pool and use plaintiffs' copyrights, not for the professed purpose of protecting the value of plaintiffs' copyrighted motion pictures, but rather for the ulterior purpose of restraining Sony and Sony America from marketing the Betamax system with its off-the-air recording capability and thereby of eliminating the Betamax system from the United States home video market in an attempt to preempt that market for the videodisc system.

77. In furtherance of said combination and conspiracy and course of unfair and inequitable conduct, Universal and Disney have done at least the following, involving a misuse of their copyrights:

(a) plaintiffs refuse to license their copyrighted motion pictures for professional pre-recording on Betamax tapes, with the intent thereby of restraining competition by the Betamax system;

(b) plaintiffs and MCA have told other movie studios, owners of copyrighted motion pictures and others in the entertainment industry what plaintiffs are doing, and have solicited said entities to do likewise and to otherwise support plaintiffs' position herein;

(c) plaintiffs and MCA have stated to the public that the consumer's use of the Betamax system to record plaintiffs' motion pictures for home use constitutes a "stealing" of plaintiffs' motion pictures;

(d) plaintiffs and MCA threatened Sony and Sony America with this lawsuit unless Sony withdrew from the consumer videotape recording business;

(e) plaintiffs filed this action, based solely on collusive and induced alleged infringements, not for the professed purpose of protecting the value of their copyrighted motion pictures, but rather for the purpose of removing any competitive advantage of the Betamax system over the videodisc system by removing the Betamax system's capability of recording telecasts off-the-air;

(f) plaintiffs and MCA have used and are using this lawsuit and its attendant publicity unreasonably to restrain competition in the United States home video market.

78. By reason of the foregoing, plaintiffs, and each of them, thus have come to this Court with unclean hands and are barred from asserting any of the purported causes of action alleged *in the* complaint.

FOR A FURTHER, SEPARATE, AND ELEVENTH DISTINCT ANSWER AND DEFENSE, EACH DEFENDANT ALLEGES:

79. Paragraphs 73 through 77, inclusive, of this Answer are incorporated herein with the same force and effect as if herein set forth in full.

80. The relevant product market involved here consists of the home video market, comprised of home use videotape systems and videodisc systems. The relevant geographic market involved here consists of the United States (viz., all areas where United States copyright laws are in effect).

81. Plaintiffs have misused and are misusing their copyrights in furtherance of a combination and conspiracy unreasonably to restrain and monopolize trade and commerce, and as a part of an attempt to monopolize trade and commerce, by eliminating Sony's Betamax system from the United States home video market in order to preempt that market for videodisc machines and professionally prerecorded videodiscs.

82. By reason of the foregoing, plaintiffs' copyrights are unenforceable and each of the purported causes of action alleged in the complaint cannot be maintained.

WHEREFORE, each defendant prays for judgment in this action as follows:

1. That the complaint be dismissed with prejudice.

2. That these defendants, and each of them, have and recover their costs and reasonable attorneys' fees incurred herein.

3. For such other and further relief as to the Court may seem just and proper.

RUTTER & EBBERT
MARSHALL A. RUTTER
By /s/ Marshall A. Rutter
MARSHALL A. RUTTER
Attorneys for Defendants

(Certificate of service omitted in printing)

Stipulation Re Amendment of First Supplemental and Amended Complaint and Order Thereon.

United States District Court Central District of California.

(Title omitted in printing).

No. CV 76 3520 F.

Filed: July 13, 1978.

WHEREAS, plaintiffs, at a deposition attended by defendants' attorneys, discovered that Marc Wielage has made Betamax recordings of motion pictures owned by plaintiffs after January 1, 1978; and,

WHEREAS, Marc Wielage is a Betamax owner mentioned by name in Count VII of the First Supplemental and Amended Complaint on file herein; and,

WHEREAS, the titles of such motion pictures are "Saboteur" and "House of Frankenstein" (ownership to which is claimed by Universal) and "Disneyland — The Adventures of Chip 'N Dale" (ownership to which is claimed by Disney); and,

WHEREAS, plaintiffs desire to supplement and amend the First Supplemental and Amended Complaint so as to allege said post-January 1, 1978 Betamax recordings made by Marc Wielage on his Betamax; and,

WHEREAS, said amendment will incorporate allegations of copyright infringements by a Betamax owner which occurred after the effective date of the Copyright Revision Act of 1976 ("New Act") and, hence, will incorporate allegations of infringement of specifically named motion pictures under the New Act; and,

WHEREAS, the sole changes which plaintiffs wish to make in the First Supplemental and Amended Complaint are the addition of the titles "Saboteur," "House of Frankenstein" and "Disneyland — The Adventures of Chip 'N

Dale'' to paragraphs 79, 80, 81 and 82 in Count VII of the First Supplemental and Amended Complaint and to paragraphs 2 and 3 of the prayer thereof;

NOW, THEREFORE, it is hereby stipulated and agreed as follows:

1. Plaintiffs may amend paragraphs 79, 80, 81 and 82 of Count VII and paragraphs 2 and 3 of the prayer of the First Supplemental and Amended Complaint. The amendment of said paragraphs shall be in the form attached hereto as Exhibit ''A''.

2. Upon approval by the Court of the filing of the foregoing amendment, plaintiffs shall file and serve a Second Supplemental and Amended Complaint which shall incorporate said amendment but which shall incorporate no other changes.

3. Defendants shall not be required to file an answer to the aforesaid Second Supplemental and Amended Complaint. The answers of defendants to the First Supplemental and Amended Complaint on file herein shall be deemed to be defendants' answers to the Second Supplemental and Amended Complaint.

4. Plaintiffs will supplement their answers to the following interrogatories and requests for admission and shall produce further documents in response to the following document requests for the titles ''Saboteur,'' ''House of Frankenstein'' and ''Disneyland — The Adventures of Chip 'N Dale'' as though said titles had been referred to in such interrogatories and document requests:

Interrogatories

A-2, A-3, B-19, B-20, C-10(j) and C-11(c)

Request for Production of Documents by Universal (October 3, 1977)

A-2, A-4(b), A-4(k), A-5, A-7, A-8, A-10, A-11, A-14

Request For Production of Documents by Walt Disney (September 30, 1977)

A-10, A-12(d), A-12(g), A-12(h), A-13

Request for Production of Documents (February 17, 1978)

B-1, B-12, B-15(e), B-15(h)

First Request for Admissions of Fact

Nos. 1(j), 2(c), 19

Third Request for Admissions of Fact

B-2, B-3, B-4, B-5

DATED: June 22

ROSENFELD, MEYER & SUSMAN
STEPHEN A. KROFT
JOHN G. DAVIES
EDWIN M. SMITH
By /s/ Stephen A. Kroft
STEPHEN A. KROFT
Attorneys for Plaintiffs

DATED: July 6, 1978

GIBSON, DUNN & CRUTCHER
DEAN C. DUNLAVEY
DONALD E. SLOAN
and
ROSENMAN COLIN FREUND
LEWIS & COHEN
AMBROSE DOSKOW
By /s/ Dean C. Dunlavey
DEAN C. DUNLAVEY
Attorneys for Defendants
SONY CORPORATION OF AMERICA, THE SONY CORPORATION and DOYLE DANE BERNBACH, INC.

DATED: July 10, 1978

RUTTER & EBBERT
MARSHALL A. RUTTER
WARREN G. GREENE
By /s/ Marshall A. Rutter
MARSHALL A. RUTTER
Attorneys for Defendants
CARTER HAWLEY HALE STORES, INC.,
ASSOCIATED DRY GOODS CORPORATION,
FEDERATED DEPARTMENT STORES, INC.
and HENRY'S CAMERA CORPORATION

ORDER

The Court, having read the foregoing Stipulation of the parties, and good cause appearing therefor,

IT IS HEREBY ORDERED that plaintiffs may file a Second Supplemental and Amended Complaint which shall supplement and amend the First Supplemental and Amended Complaint only in the respects set forth in Exhibit "A" hereto. Defendants' answers to the First Supplemental and Amended Complaint on file herein shall be deemed to be their answers to said Second Supplemental and Amended Complaint and defendants shall not be required to file a further answer to said Second Supplemental and Amended Complaint.

IT IS FURTHER ORDERED that plaintiffs shall comply with the discovery obligations set forth in paragraph 4 of the foregoing Stipulation.

DATED: July 13, 1978

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

Exhibit "A".

79. Within the last three years, Marc Wiciage purchased a Betamax and Betamax tapes from a retail television outlet and used them to record and copy, and did record and copy, or caused to be recorded and copied, the following copyrighted motion pictures owned by Disney, or substantial portions thereof:

(a) "Mickey Mouse Club — Show No. C-001";

(b) "Walt Disney Presents — This Is Your Life, Donald Duck";

(c) "On Vacation — Fantasyland — Show No. 26" ("On Vacation With Mickey Mouse and Friends");

(d) "Mickey Mouse Club — Show No. C-028", including the copyrighted animated cartoon entitled "Fire Chief";

(e) "Mickey Mouse Club — Show No. C-024", including the copyrighted animated cartoon entitled "Mickey's Parrot";

(f) "Mickey Mouse Club — Show No. C-026", including the copyrighted animated cartoon entitled "Trick Or Treat";

(g) "Mickey Mouse Club — Show No. C-030", including the copyrighted animated cartoon entitled "The Tortoise And The Hare";

(h) "Mickey Mouse Club — Show No. C-011", including the copyrighted animated cartoon entitled "Clock Cleaners";

(i) "Mickey Mouse Club — Show No. C-082", including the copyrighted animated cartoon entitled "The Autograph Hound";

(j) "Mickey Mouse Club — Show No. C-041", including the copyrighted animated cartoon entitled "The Pointer";

(k) "Mickey Mouse Club — Show No. C-049", including the copyrighted animated cartoon entitled "Hawaiian Holiday; and

(l) "Disneyland — The Adventures of Chip 'N Dale"

80. Disney has complied in all respects with the Copyright Act with respect to such motion pictures and animated cartoons and the copyrights therein. Disney has applied for and received Certificates of Registration of a Claim to Copyright in each said motion picture and animated cartoon with the following registration numbers and registration dates (and renewal registration numbers and registration dates, where applicable):

Title	*Reg. No.*	*Reg. Date*
"Mickey Mouse Club – Show No. C-001"	MP 31684	10/19/77
"Walt Disney Presents – This Is Your Life, Donald Duck"	LP 19475	6/12/61
"On Vacation – Fantasyland – Show No. 26" ("On Vacation With Mickey And Friends")	LP 8692	7/12/57
"Mickey Mouse Club – Show No. C-028"	MP 31708	11/8/77
"Fire Chief"	LI:10100	12/11/40
Renewal:	R 427857	1/25/68
"Mickey Mouse Club – Show No. C-024"	MP 31707	11/8/77
"Mickey's Parrot"	MI:8723	8/29/38
Renewal:	R 367156	9/7/65
"Mickey Mouse Club – Show No. C-026"	MP 31706	11/8/77
"Trick Or Treat"	LP 2554	5/14/53
"Mickey Mouse Club – Show No. C-030"	MP 31709	11/8/77
"The Tortoise And The Hare"	MI:5741	7/18/35
Renewal:	R 291829	3/5/62
"Mickey Mouse Club – Show No. C-011"	MP 31711	11/8/77
"Clock Cleaners"	MI:7798	10/1/37
Renewal:	R 342444	8/3/64
"Mickey Mouse Club – Show No. C-082"	MP 31705	11/8/77
"The Autograph Hound"	LI:9351	1/19/40
Renewal:	R 394379	9/26/66
"Mickey Mouse Club – Show No. C-041"	MP 31710	11/8/77

Title		*Reg. No.*	*Reg. Date*
"The Pointer"		LI:8989	7/26/39
	Renewal:	R 390658	7/26/66
"Mickey Mouse Club – Show No. C-049"		MP 31676	10/19/77
"Hawaiian Holiday"		MI:7799	10/1/37
	Renewal:	R 342445	8/3/64
"Disneyland – The Adventures of Chip 'N Dale"		LP 16261	5/17/60

81. Universal is informed and believes and therefore alleges that within the last three years, Marc Wielage purchased a Betamax and Betamax tapes from a retail television outlet and used them to record and copy, and did record and copy, or caused to be recorded and copied, the following copyrighted motion pictures owned by Universal:

(a) "Frankenstein";
(b) "Bride of Frankenstein";
(c) "Son of Frankenstein";
(d) "The Mummy";
(e) "The Time Of Their Lives";
(f) "This Island Earth";
(g) "The Wolf Man";
(h) "The Mummy's Hand";
(i) "Duel";
(j) "The House of Fear";
(k) "Horsefeathers";
(i) "Duck Soup";
(m) "House of Frankenstein"; and
(n) "Saboteur".

The copyright in each of the foregoing motion pictures was originally secured by, and a Certificate of Registration of a Claim to Copyright issued to, the parties listed below with the following registration numbers and registration dates:

Title	*Registrant*	*Reg. No.*	*Reg. Date*
"Frankenstein"	Universal Pictures Corporation	LP 2631	11/17/31

Title	*Registrant*	*Reg. No.*	*Reg. Date*
"Bride Of Frankenstein"	Universal Pictures Corporation	LP 5500	4/27/35
"Son Of Frankenstein"	Universal Pictures Company, Inc.	LP 8574	1939
"The Mummy"	Universal Pictures Corporation	L 3478	12/15/32
"The Time Of Their Lives"	Universal Pictures Company, Inc.	LP 513	8/23/46
"This Island Earth"	Universal Pictures Company, Inc.	LP 4492	3/16/55
"The Wolf Man"	Universal Pictures Company, Inc.	LP 10910	12/16/41
"The Mummy's Hand"	Universal Pictures Company, Inc.	LP 9854	1940
"Duel"	Universal City Studios, Inc.	LP 43718	8/6/74
"The House Of Fear"	Universal Pictures Company, Inc.	LP 13029	1/5/45
"Horsefeathers"	Paramount Publix Corporation	L 3209	1932
"Duck Soup"	Paramount Productions, Inc.	LL 4246	1933
"House of Frankenstein"	Universal Pictures Co., Inc.	L 12971	11/30/44
"Saboteur"	Universal Pictures Co., Inc.	L 11248	5/1/42

82. With respect to each of the aforesaid copyrights for which the original twenty-eight year term has expired, a Certificate of Registration of a Claim of Renewal Copyright was duly applied for and received by the following parties with the following registration numbers and registration dates:

Title	*Registrant*	*Reg. No.*	*Reg. Date*
"Frankenstein"	Universal Pictures Company, Inc.	R 243591	10/12/59

Title	*Registrant*	*Reg. No.*	*Reg. Date*
"Bride Of Frankenstein"	Universal Pictures Company, Inc.	R 306308	12/12/62
"Son Of Frankenstein"	Universal Pictures Company, Inc.	R 379441	2/4/66
"The Mummy"	Universal Pictures Company, Inc.	R 258457	6/17/60
"The Time Of Their Lives"	Universal Pictures, a division of Universal City Studios, Inc.	R 560649	9/7/73
"The Wolf Man"	Universal Pictures, a division of Universal City Studios, Inc.	R 455081	1/23/69
"The Mummy's Hand"	Universal Pictures, a division of Universal City Studios, Inc.	R 417137	9/11/67
"The House Of Fear"	Universal Pictures, a division of Universal City Studios, Inc.	R 518424	12/9/71
"Horsefeathers"	EMKA, Ltd.	R 249564	1/8/60
"Duck Soup"	EMKA, Ltd.	R 267241	11/25/60
"House of Frankenstein"	Universal Pictures, a division of Universal City Studios, Inc.	R 519193	12/20/71
"Saboteur"	Universal Pictures, a division of Universal City Studios, Inc.	R 462624	6/13/69

AMENDMENT TO PRAYER

2. That defendants, and each of them, be adjudged to have infringed Universal's copyrights in its motion pictures "Adam 12", "The Sakai Ito Story" (which is an episode of the television series "Major Adams"), "Run Sam, Run" (which is an episode of the television series "Gemini

Man''), ''Captains And The Kings, Chapter III'', ''Never Give An Inch'' (originally entitled ''Sometimes A Great Notion''), ''Alpha Caper'', ''Amelia Earhart'', an episode of ''Baa Baa Blacksheep'' entitled ''Presumed Dead'', an episode of ''Holmes And Yo-Yo'' entitled ''The Last Phantom'', ''Frankenstein'', ''Bride Of Frankenstein'', ''Son Of Frankenstein'', ''The Mummy'', ''The Time Of Their Lives'', ''This Island Earth'', ''The Wolf Man'', ''The Mummy's Hand'', ''Duel'', ''The House Of Fear'', ''Horsefeathers'', ''Duck Soup'', two episodes from the ''Bionic Woman'' television series entitled (a) ''Fembots In Las Vegas, Part I'' and (b) ''Fembots In Las Vegas, Part II'', an episode from the ''Quincy'' televsion series entitled ''Who's Who In Neverland'', ''Psycho'', ''House of Frankenstein'', ''Saboteur'', and such other motion pictures as Universal shall prove at trial to have been copied by defendants and purchasers of Betamax and Betamax tapes;

3. That defendants, and each of them, be adjudged to have infringed Disney's copyrights in its motion pictures ''Mickey Mouse Club - Show No. C-001'', ''Walt Disney Presents - This Is Your Life, Donald Duck'', ''On Vacation - Fantasyland - Show No. 26'' (''On Vacation With Mickey Mouse And Friends''), ''Mickey Mouse Club - Show No. C-028'' (including the animated cartoon entitled ''Fire Chief''), ''Mickey Mouse Club - Show No. C-024'' (including the animated cartoon entitled ''Mickey's Parrot''), ''Mickey Mouse Club - Show No. C-026'' (including the animated cartoon entitled ''Trick Or Treat''), ''Mickey Mouse Club - Show No. C-030'' (including the animated cartoon entitled ''The Tortoise And The Hare''), ''Mickey Mouse Club - Show No. C-011'' (including the animated cartoon entitled ''Clock Cleaners''), ''Mickey Mouse Club - Show No. C-082'' (including the animated cartoon entitled ''The Autograph Hound''), ''Mickey Mouse Club - Show

No. C-041'' (including the animated cartoon entitled ''The Pointer''), ''Mickey Mouse Club - Show No. C-049'' (including the animated cartoon entitled ''Hawaiian Holiday''), ''Mickey Mouse Club - Show No. C-003'' (including the animated cartoon entitled ''Donald Applecore''), ''Mickey Mouse Club - Show No. C-015'' (including the animated cartoon entitled ''Pluto's Quinpuplets''), ''Mickey Mouse Club - Show No. C-035'' (including the animated cartoon entitled ''Modern Inventions''), ''Mickey Mouse Club - Show No. C-040'' (including the animated cartoon entitled ''Two Chips And A Miss''), ''Mickey Mouse Club - Show No. C-044'' (including the animated cartoon entitled ''Donald's Better Self''), ''Mickey Mouse Club - Show No. C-079'' (including the animated cartoon entitled ''Spare The Rod''), ''Disneyland - The Adventures of Chip 'N Dale'', and such other motion pictures as Disney shall prove at trial to have been copied by defendants and purchasers of Betamax and Betamax tapes;

Second Supplemental and Amended Complaint for Copyright Infringement, Unfair Competition, Intentional Interference With Contractual and Advantageous Business Relationships, and Declaratory Judgment.

United States District Court Central District of California.

(Title omitted in printing).

No. CV 76 3520 F.

Filed: July 25, 1978.

Plaintiffs complain and allege as follows:

JURISDICTION

1. This is an action for copyright infringement under the Copyright Act of the United States, Title 17, United States Code, §§1 et seq. (''the Copyright Act''), and for unfair competition, and for intentional interference with contractual and advantageous business relationships and for declaratory judgment. Jurisdiction over Counts I through X is conferred by virtue of Title 28, U.S.C. §1338(a). Jurisdiction over Count XI is conferred by virtue of Title 28, U.S.C. §§1338(a) and 2201. Jurisdiction over Counts XII and XIII is conferred by virtue of Title 15, U.S.C. §§1121, 1125(a) and Title 28, U.S.C. §1338(a). Jurisdiction over Counts XIV, XV, XVI and XVII is conferred by virtue of Title 15, U.S.C. §§1121, 1126 and Title 28, U.S.C. §1338(a) and, in the alternative, by virtue of Title 28, U.S.C. §1338(b) and by the doctrine of pendant jurisdiction, such counts being claims arising out of substantially the same facts as Counts I through XIII.

THE PARTIES

2. Plaintiff Universal City Studios, Inc. (''Universal'') is now and at all times mentioned herein was a corporation duly organized and existing under and by virtue of the laws

of the State of Delaware and qualified to do business in the State of California, with its principal place of business in Los Angeles County, California. At all times mentioned herein, Universal has done business under its own name and under the fictitious names, among others, of Universal Television, Universal Pictures, Universal 16 and United World Films. Universal is a wholly owned subsidiary of MCA Inc.

3. Plaintiff Walt Disney Productions ("Disney") is now and at all times mentioned herein was a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in Orange County, California.

4. Plaintiffs are informed and believe and therefore allege that defendant Sony Corporation of America ("Sony America") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the State of New York and qualified to do business and doing business in the State of California; and that its principal office in said state is located in Los Angeles County, California. Sony America is a wholly owned subsidiary of The Sony Corporation.

5. Plaintiffs are informed and believe and therefore allege that defendant The Sony Corporation ("Sony") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the Country of Japan and is and at all times mentioned herein was transacting business in the State of California, County of Los Angeles.

6. Plaintiffs are informed and believe and therefore allege that defendant Carter Hawley Hale Stores, Inc. ("Carter Hawley") is now and at all times mentioned herein was a corporation duly organized and existing under the

laws of the State of California, with its principal place of business in Los Angeles County, California.

7. Plaintiffs are informed and believe and therefore allege that defendant Associated Dry Goods Corporation ("Associated/Robinson") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the State of California, or some other state, with its principal place of business in Los Angeles County, California.

8. Plaintiffs are informed and believe and therefore allege that defendant Federated Department Stores, Inc. ("Federated/Bullock's") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the State of California, or some other state, with its principal place of business in Los Angeles County, California.

9. Plaintiffs are informed and believe and therefore allege that defendant Henry's Camera Corporation ("Henry's Camera") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the State of California, with its principal place of business in Los Angeles County, California.

10. The defendants identified in paragraphs 6 through 9 hereinabove shall sometimes be collectively referred to hereinafter as "the retail defendants".

11. Plaintiffs are informed and believe and therefore allege that defendant Doyle Dane Bernbach, Inc. ("DDBI") is now and at all times mentioned herein was a corporation duly organized and existing under the laws of the State of California, with its principal place of business in Los Angeles County, California.

12A. Plaintiffs are informed and believe and therefore allege that defendant William Griffiths is now and at all

times mentioned herein was a resident and citizen of the State of California, County of Los Angeles.

12B. Plaintiffs are informed and believe and therefore allege that James Lowe is now and at all times mentioned herein was a resident and citizen of the State of Florida.

12C. Plaintiffs are informed and believe and therefore allege that Mr. and Mrs. Geoffrey Soule are now and at all times mentioned herein were residents and citizens of the State of California, County of Los Angeles.

12D. Plaintiffs are informed and believe and therefore allege that Mr. and Mrs. Clinton Bird are now and at all times mentioned herein were residents and citizens of the State of California, County of Los Angeles.

12E. Plaintiffs are informed and believe and therefore allege that Marc Wielage is now and for a substantial period of time has been a resident and citizen of the State of California, County of Los Angeles.

COUNT I

(By Universal Against Sony, Sony America, Carter Hawley And DDBI For Copyright Infringement)

13. Universal hereby refers to paragraphs 1, 2, 4, 5, 6, 10 and 11 hereinabove and incorporates them, each and all, herein by this reference.

14. Universal is now and at all times mentioned herein was the producer of motion pictures for theatrical and television exhibition. All of such motion pictures are duly copyrighted under the Copyright Act; and such copyrights are owned by Universal. Universal is also the owner and proprietor of several motion pictures, and the copyrights therein, which were produced and originally copyrighted by persons other than Universal.

15. Many of the copyrighted motion pictures produced and owned by Universal have been, are now and will in the future be exhibited on television as feature movies, episodes of network television series and episodes of syndicated television series.

16. Plaintiffs are informed and believe and therefore allege that defendant Sony is the manufacturer of and is presently manufacturing a videotape recording machine known as "Betamax" which is sold in two models designated as follows: (1) Model Nos. SL-7200, SL-8200 and SLO-260 ("table model") and (2) Model No. LV-1901 ("console model"); plaintiffs are further informed and believe and therefore allege that Sony is currently manufacturing other videotape recording machines designated by model numbers and names currently unknown to plaintiffs. (The table model and console model and all other said videotape recording machines will sometimes hereinafter collectively be referred to as "Betamax".) Betamax is designed and manufactured by Sony for sale to owners of television sets in the United States who watch television shows on said television sets in the United States, including motion pictures produced, copyrighted and owned by plaintiffs.

17. Plaintiffs are informed and believe and therefore allege that Sony is the manufacturer of and is presently manufacturing videotape cassettes for use in the Betamax (hereinafter "Betamax tapes").

18. Defendant Sony America is the United States distributor of Betamax and Betamax tapes. Said defendant is currently selling and distributing Betamax and Betamax tapes for sale to the public in the United States. Plaintiffs are informed and believe and therefore allege that Sony America has sold and distributed and is selling and distributing Betamax and Betamax tapes to the retail defendants

and other retail television sales outlets throughout the United States.

19. The Betamax is designed, manufactured, sold and distributed by defendants for the main and primary purpose of inducing and allowing purchasers thereof to record on Betamax tapes copies of television shows, including motion pictures owned and copyrighted by plaintiffs.

20. Plaintiffs are informed and believe and therefore allege that Sony, Sony America and DDBI have engaged in a nationwide advertising campaign, and in furtherance thereof, have produced and published and exhibited and broadcast to the public televised, sound recorded and printed advertisements and brochures throughout the United States, in interstate commerce, for the purpose of selling Betamax and Betamax tapes to the public for use by the public in making copies of television shows, including motion pictures owned and copyrighted by plaintiffs. An example of such advertisements is attached hereto as Exhibit "A" and is incorporated in full herein by reference. The retail defendants have also participated in said advertising campaign. Plaintiffs are informed and believe and therefore allege that said defendants and the retail defendants are continuing and intend to continue to engage in said advertising campaign.

20A. By engaging in the acts and conduct herein alleged, Sony, Sony America, DDBI and the retail defendants have induced, encouraged, solicited, aided and abetted the infringement of the copyrights owned by plaintiffs as hereinafter alleged. All of said acts and conduct have occurred in or have affected interstate commerce.

21. The retail defendants and the other retail television sales outlets referred to in paragraph 18 hereinabove have sold and are offering for sale and are selling Betamax and Betamax tapes throughout the United States for the purpose

of inducing and allowing purchasers thereof to record and copy on Betamax tapes television shows, including motion pictures owned and copyrighted by plaintiffs. Said purchasers are, in fact, using their Betamax and Betamax tapes to record and copy copyrighted motion pictures owned by plaintiffs without the consent of plaintiffs.

22. In or about September, 1976, defendant Carter Hawley used a Betamax and recorded and copied on a Betamax tape a substantial portion of a motion picture owned and copyrighted by Universal which is part of the television series entitled "Adam 12". Said copy was made by Carter Hawley for the purpose of demonstrating and selling Betamax and Betamax tapes to the public. Universal is informed and believes and therefore alleges that on October 1, 1976, and on other dates currently unknown to Universal, Carter Hawley exhibited said copy of said motion picture to members of the public for the aforesaid purpose. Universal has complied in all respects with the Copyright Act with respect to said motion picture and the copyright therein. Universal has applied for and received a Certificate of Registration of a Claim to Copyright in said motion picture. The title and copyright registration number and registration date of said motion picture are currently unknown to Universal, but Universal will seek leave to amend this paragraph when said information becomes known to Universal. The foregoing conduct was without Universal's consent and constituted an infringement upon Universal's copyright in said motion picture.

23. On October 18, 1976, defendant Carter Hawley, in public, used a Betamax and recorded and copied on a Betamax tape a substantial portion of a motion picture entitled "The Sakai Ito Story", which is an episode of the television series entitled "Major Adams". Thereafter, said defendant exhibited said copy to the public. Said motion

picture, and the copyright therein, is owned by Universal. Revue Productions, Inc. ("Revue") applied for and received a Certificate of Registration of a Claim to Copyright in said motion picture with the following registration number and registration date: LP 13563, April 20, 1959. Prior to October 18, 1976, Revue assigned said copyright to Universal. Revue and Universal have complied in all respects with the Copyright Act with respect to said motion picture and the copyright therein. The foregoing conduct was without Universal's consent and constituted infringements upon Universal's copyright in said motion picture.

24. Universal is informed and believes and therefore alleges that Carter Hawley has recorded and copied on Betamax and Betamax tapes many other motion pictures owned and copyrighted by Universal and has exhibited such copies to the public for the purpose of selling Betamax and Betamax tapes. Carter Hawley has thereby infringed Universal's copyrights in said motion pictures. Universal is unaware of the titles and copyright registration numbers of said motion pictures and the dates of copying and exhibition thereof by Carter Hawley; Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

25. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Universal does not have in its possession and is unable to obtain copies of the aforesaid infringing copies of said motion pictures,

and, accordingly, Universal is unable to attach copies thereof to this Complaint.

26. Universal is informed and believes and therefore alleges that Carter Hawley has sold Betamax and Betamax tapes to members of the public in California (including Los Angeles County) and in other states for the purpose of inducing and allowing purchasers thereof to record and copy on Betamax tapes television shows, including motion pictures owned and copyrighted by Universal. Universal is informed and believes and therefore alleges that the purchasers of said Betamax and Betamax tapes have used them to record and copy and have recorded and copied several motion pictures owned and copyrighted by Universal. Said copies were made without Universal's consent and constitute infringement upon Universal's said copyrights. Universal does not know (a) the number of Betamax and Betamax tapes sold by Carter Hawley, (b) the identities of the purchasers of said Betamax and Betamax tapes, or (c) the titles and copyright registration numbers of the motion pictures copied as aforesaid. However, Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

27. The foregoing acts and conduct of defendants have been without the consent of Universal and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Universal has been damaged in an amount currently unknown to Universal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

28. Universal is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts

and conduct. Universal is unaware of the exact amount of such profits derived and received by defendants, and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

29. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Universal's copyrights in the motion pictures owned and copyrighted by Universal unless restrained and enjoined by this Court from doing so.

30. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

31. Universal is informed and believes and therefore alleges that in doing the acts and things alleged hereinabove, defendants, and each of them, acted in bad faith and in complete disregard of the rights of Universal, and Universal is therefore entitled to recover as part of its costs herein reasonable attorneys' fees to be awarded by the Court.

COUNT II

(By Universal Against Sony, Sony America, Associated/ Robinson And DDBI For Copyright Infringement)

32. Universal hereby refers to paragraphs 1, 2, 4, 5, 7, 10 and 11, and paragraphs 14 through 21, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

33. On October 14, 1976, defendant Associated/ Robinson, in public, used a Betamax and recorded and copied on a Betamax tape a substantial portion of a motion picture entitled "Run Sam, Run", which is an episode of the television series entitled "Gemini Man". Thereafter, said defendant exhibited said copy to the public. Said motion picture is owned and copyrighted by Universal and Universal has applied for and received a Certificate of Registration of a Claim to Copyright in said motion picture with the following registration number and registration date: LP 46642, November 5, 1976. Universal has complied in all respects with the Copyright Act with respect to said motion picture and the copyright therein. The foregoing conduct was without Universal's consent and constituted infringements upon Universal's copyright in said motion picture.

34. Universal is informed and believes and therefore alleges that Associated/Robinson has recorded and copied on Betamax and Betamax tapes many other motion pictures owned and copyrighted by Universal and has exhibited such copies to the public for the purpose of selling Betamax and Betamax tapes. Associated/Robinson has thereby infringed Universal's copyrights in said motion pictures. Universal is unaware of the titles and copyright registration numbers of said motion pictures and the dates of copying and exhibition thereof by Associated/Robinson; Universal will

seek leave to amend this paragraph to allege such information when it becomes known to Universal.

35. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Universal does not have in its possession and is unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, Universal is unable to attach copies thereof to this Complaint.

36. Universal is informed and believes and therefore alleges that Associated/Robinson has sold Betamax and Betamax tapes to members of the public in California (including Los Angeles County) and in other states for the purpose of allowing purchasers thereof to record and copy on Betamax tapes television shows, including motion pictures owned and copyrighted by Universal. Universal is informed and believes and therefore alleges that the purchasers of said Betamax and Betamax tapes have used them to record and copy and have recorded and copied several motion pictures owned and copyrighted by Universal. Said copies were made without Universal's consent and constitute infringements upon Universal's said copyrights. Universal does not know (a) the number of Betamax and Betamax tapes sold by Associated/Robinson, (b) the identities of the purchasers of said Betamax and Betamax tapes, or (c) the titles and copyright registration numbers of the motion pictures copied as aforesaid. However, Universal will

seek leave to amend this paragraph to allege such information when it becomes known to Universal.

37. The foregoing acts and conduct of defendants have been without the consent of Universal and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Universal has been damaged in an amount currently unknown to Universal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

38. Universal is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

39. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Universal's copyrights in the aforesaid motion pictures and other motion pictures owned and copyrighted by Universal unless restrained and enjoined by this Court from doing so.

40. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great

and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

41. Universal is informed and believes and therefore alleges that in doing the acts and things alleged hereinabove, defendants, and each of them, acted in bad faith and in complete disregard of the rights of Universal, and Universal is therefore entitled to recover as part of its costs herein reasonable attorneys' fees to be awarded by the Court.

COUNT III

(By Universal Against Sony, Sony America, Federated/ Bullock's And DDBI For Copyright Infringement)

42. Universal hereby refers to paragraphs 1, 2, 4, 5, 8, 10 and 11, and paragraphs 14 through 21, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

43. On October 14, 1976, defendant Federated/Bullock's, in public, used a Betamax and recorded and copied on a Betamax tape a substantial portion of a motion picture entitled "Captains And The Kings, Chapter III". Thereafter, said defendant exhibited said copy to the public. Said motion picture is owned and copyrighted by Universal, and Universal has applied for and received a Certificate of Registration of a Claim to Copyright in said motion picture with the following registration number and registration date: LP 46643, November 5, 1976. Universal has complied in all respects with the Copyright Act with respect to said motion picture and the copyright therein. The foregoing conduct was without Universal's consent and constituted infringements upon Universal's copyright in said motion picture.

44. Universal is informed and believes and therefore alleges that Federated/Bullock's has recorded and copied on Betamax and Betamax tapes many other motion pictures owned and copyrighted by Universal and has exhibited such copies to the public for the purpose of selling Betamax and Betamax tapes. Federated/Bullock's has thereby infringed Universal's copyrights in said motion pictures. Universal is unaware of the titles and copyright registration numbers of said motion pictures and the dates of copying and exhibition thereof by Federated/Bullock's; Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

45. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Universal does not have in its possession and is unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, Universal is unable to attach copies thereof to this Complaint.

46. Universal is informed and believes and therefore alleges that Federated/Bullock's has sold Betamax and Betamax tapes to members of the public in California (including Los Angeles County) and in other states for the purpose of allowing purchasers thereof to record and copy on Betamax tapes television shows, including motion pictures owned and copyrighted by Universal. Universal is informed and believes and therefore alleges that the purchasers of said Betamax and Betamax tapes have used them

to record and copy and have recorded and copied several motion pictures owned and copyrighted by Universal. Said copies were made without Universal's consent and constitute infringements upon Universal's said copyrights. Universal does not know (a) the number of Betamax and Betamax tapes sold by Federated/Bullock's, (b) the identities of the purchasers of said Betamax and Betamax tapes, or (c) the titles and copyright registration numbers of the motion pictures copied as aforesaid. However, Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

47. The foregoing acts and conduct of defendants have been without the consent of Universal and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Universal has been damaged in an amount currently unknown to Universal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

48. Universal is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

49. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set

forth hereinabove and to continue to infringe Universal's copyrights in the aforesaid motion pictures and other motion pictures owned and copyrighted by Universal unless restrained and enjoined by this Court from doing so.

50. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

51. Universal is informed and believes and therefore alleges that in doing the acts and things alleged hereinabove, defendants, and each of them, acted in bad faith and in complete disregard of the rights of Universal, and Universal is therefore entitled to recover as part of its costs herein reasonable attorneys' fees to be awarded by the Court.

COUNT IV

(By Universal Against Sony, Sony America, Henry's Camera And DDBI For Copyright Infringement)

52. Universal hereby refers to paragraphs 1, 2, 4, 5, 9, 10 and 11, and paragraphs 14 through 21, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

53. Universal is informed and believes and therefore alleges that Henry's Camera has copied on Betamax and Betamax tapes many motion pictures owned and copyrighted by Universal and has exhibited such copies to the public for the purpose of selling Betamax and Betamax tapes. Henry's Camera has thereby infringed Universal's

copyrights in said motion pictures. Universal is unaware of the titles and copyright registration numbers of said motion pictures and the dates of the copying and exhibition thereof by Henry's Camera; Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

54. Universal is informed and believes and therefore alleges that Henry's Camera has sold Betamax and Betamax tapes to members of the public in California (including Los Angeles County) and in other states for the purpose of allowing purchasers thereof to record and copy on Betamax tapes television shows, including motion pictures owned and copyrighted by Universal. Universal is informed and believes and therefore alleges that the purchasers of said Betamax and Betamax tapes have used them to record and copy and have recorded and copied several motion pictures owned and copyrighted by Universal. Said copies were made without Universal's consent and constitute infringements upon Universal's said copyrights. Universal does not know (a) the number of Betamax and Betamax tapes sold by Henry's Camera, (b) the identities of the purchasers of said Betamax and Betamax tapes, or (c) the titles and copyright registration numbers of the motion pictures copied as aforesaid. However, Universal will seek leave to amend this paragraph to allege such information when it becomes known to Universal.

55. The foregoing acts and conduct of defendants have been without the consent of Universal and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Universal has been damaged in an amount currently unknown to Universal. Universal will seek leave to amend this paragraph to

allege the amount of such damages when the same has been ascertained by Universal.

56. Universal is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

57. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Universal's copyrights in the aforesaid motion pictures and other motion pictures owned and copyrighted by Universal unless restrained and enjoined by this Court from doing so.

58. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

59. Universal is informed and believes and therefore alleges that in doing the acts and things alleged hereinabove, defendants, and each of them, acted in bad faith and in

complete disregard of the rights of Universal, and Universal is therefore entitled to recover as part of its costs herein reasonable attorneys' fees to be awarded by the Court.

COUNT V

(By Universal Against Sony, Sony America, Henry's Camera, DDBI And William Griffiths For Copyright Infringement)

60. Universal hereby refers to paragraphs 1, 2, 4, 5, 9, 10, 11 and 12A, and paragraphs 14 through 21, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

61. Within the last three years, defendant William Griffiths purchased a Betamax and Betamax tapes from Henry's Camera and used them to record and copy, and did record and copy, the following motion pictures owned and copyrighted by Universal and Newman-Foreman Company, Inc. ("Newman-Foreman"): "Never Give An Inch" (originally entitled "Sometimes A Great Notion"). Universal and Newman-Foreman have complied in all respects with the Copyright Act with respect to such motion picture and the copyright therein. Universal and Newman-Foreman have applied for and received a Certificate of Registration of a Claim to Copyright in said motion picture with the following registration number and registration date: LP 41090, September 29, 1972.

61A. Within the last three years, defendant William Griffiths has also used his Betamax and Betamax tapes to record and copy and has recorded and copied the following additional motion pictures owned and copyrighted by Universal:

(a) "Alpha Caper";

(b) "Amelia Earhart";

(c) an episode of "Baa Baa Blacksheep" entitled "Presumed Dead"; and

(d) an episode of "Holmes And Yo-Yo" entitled "The Last Phantom".

Said copies were made without Universal's consent and constitute infringements upon Universal's said copyrights. Universal has applied for and received a Certificate of Registration of a Claim to Copyright in each of said motion pictures with the following registration numbers and registration dates:

Title	*Reg. No.*	*Reg. Date*
"Alpha Caper"	LP 46893	7/25/75
"Amelia Earhart"	LP 48968	9/28/77
"Presumed Dead"	LP 48969	9/28/77
"The Last Phantom"	LP 48966	9/28/77

Universal has complied in all respects with the Copyright Act with respect to such motion pictures and the copyrights therein.

61B. The foregoing conduct was without the consent of Universal or Newman-Foreman and constituted infringement upon the copyrights in said motion pictures. The said Betamax and Betamax tapes were sold to defendant William Griffiths by defendant Henry's Camera for the purpose of allowing defendant William Griffiths to record and copy television shows, including motion pictures produced, copyrighted and owned by Universal.

61C. The said Betamax and Betamax tapes were manufactured for profit by Sony and were sold for profit by Sony America to defendant Henry's Camera for the purpose of having defendant Henry's Camera sell the Betamax and Betamax tapes for profit to purchasers such as defendant William Griffiths. Sony and Sony America and DDBI engaged in the aforesaid conduct and Henry's Camera sold the aforesaid Betamax and Betamax tapes to William Grif-

fiths with the knowledge and intent that said purchasers would use the Betamax and Betamax tapes to record and copy television shows, including motion pictures produced, copyrighted and owned by Universal. Neither Sony, Sony America, DDBI nor Henry's Camera took any steps to police or control the content of the recordings made by defendant William Griffiths on said Betamax, although it was within their power to do so.

62. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Universal does not have in its possession and is unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, Universal is unable to attach copies thereof to this Complaint.

63. Omitted.

64. The foregoing acts and conduct of defendants have been without the consent of Universal or Newman-Foreman and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, Universal has been damaged in an amount currently unknown to Universal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

65. Universal is informed and believes and therefore alleges that defendants Sony, Sony America, DDBI and

Henry's Camera, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by said defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

66. Defendant William Griffiths threatens and continues to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Universal's copyrights in the motion pictures owned and copyrighted by Universal unless restrained and enjoined by this Court from doing so.

67. The acts, conduct and threatened acts and conduct of defendant William Griffiths as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendant William Griffiths is restrained and enjoined from performing the aforesaid acts and conduct and unless defendants Sony, Sony America, DDBI and Henry's Camera are ordered to take reasonable steps to prevent William Griffiths from performing the foregoing acts and conduct.

COUNT VI

(By Disney Against All Defendants Except William Griffiths For Copyright Infringement)

68. Disney hereby refers to paragraph 1, paragraphs 3 through 11, inclusive, and paragraphs 16 through 21, inclusive, hereinabove, and incorporates them, each and all, herein by this reference as though set forth in full.

69. Disney is now and at all times mentioned herein was the producer of motion pictures for theatrical and television exhibition. All of such motion pictures are duly copyrighted under the Copyright Act; and such copyrights are owned by Disney.

70. Many of the copyrighted motion pictures produced and owned by Disney have been, are now, and will in the future be exhibited on television as feature movies and episodes of television series.

71. Disney is informed and believes and therefore alleges that the retail defendants and the other retail television outlets referred to in paragraph 18 hereinabove have copied on Betamax and Betamax tapes motion pictures owned and copyrighted by Disney and have exhibited such copies to the public for the purpose of selling Betamax and Betamax tapes. Defendants have thereby infringed Disney's copyrights in said motion pictures. Disney is unaware of the titles and copyright registration numbers of said motion pictures and the dates of copying and exhibition thereof; Disney will seek leave to amend this paragraph to allege such information when it becomes known to Disney.

72. Disney is informed and believes and therefore alleges that the retail defendants and the other retail television outlets referred to in paragraph 18 hereinabove have sold Betamax and Betamax tapes to members of the public in California (including Los Angeles County) and in other

states for the purpose of allowing purchasers thereof to record and copy on Betamax tapes television shows, including motion pictures owned and copyrighted by Disney. Disney is informed and believes and therefore alleges that the purchasers of said Betamax and Betamax tapes have used them to record and copy and have recorded and copied several motion pictures owned and copyrighted by Disney. Said copies were made without Disney's consent and constitute infringements upon Disney's said copyrights. Disney does not know (a) the number of Betamax and Betamax tapes sold by the retail defendants and other retail television outlets, (b) the identities of the purchasers of said Betamax and Betamax tapes, or (c) the titles and copyright registration numbers of the motion pictures copied as aforesaid. However, Disney will seek leave to amend this paragraph to allege such information when it becomes known to Disney.

73. The foregoing acts and conduct of defendants have been without the consent of Disney and constitute infringements of the aforesaid copyrights owned by Disney. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Disney has been damaged in an amount currently unknown to Disney. Disney will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Disney.

74. Disney is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Disney is unaware of the exact amount of such profits derived and received by defendants, and Disney will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Disney, and Disney is entitled to an ac-

counting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

75. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Disney's copyrights in the motion pictures owned and copyrighted by Disney unless restrained and enjoined by this Court from doing so.

76. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Disney great and irreparable injury which cannot be adequately compensated or measured in money. Disney has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

77. Disney is informed and believes and therefore alleges that in doing the acts and things alleged hereinabove, defendants, and each of them, acted in bad faith and in complete disregard of the rights of Disney, and Disney is therefore entitled to recover as part of its costs herein reasonable attorneys' fees to be awarded by the Court.

COUNT VII

(By Disney And Universal Against Sony, Sony America and DDBI For Copyright Infringement)

78. Plaintiffs hereby refer to paragraphs 1, 2, 3, 4, 5, 11, 12E, paragraphs 14 through 21, inclusive, and paragraphs 69 and 70, hereinabove and incorporate them, each and all, herein by this reference as though set forth in full.

79. Within the last three years, Marc Wielage purchased a Betamax and Betamax tapes from a retail television outlet

and used them to record and copy, and did record and copy, or caused to be recorded and copied, the following copyrighted motion pictures owned by Disney, or substantial portions thereof:

(a) "Mickey Mouse Club — Show No. C-001";

(b) "Walt Disney Presents — This Is Your Life, Donald Duck";

(c) "On Vacation — Fantasyland — Show No. 26" ("On Vacation With Mickey Mouse And Friends");

(d) "Mickey Mouse Club — Show No. C-028", including the copyrighted animated cartoon entitled "Fire Chief";

(e) "Mickey Mouse Club — Show No. C-024", including the copyrighted animated cartoon entitled "Mickey's Parrot";

(f) "Mickey Mouse Club — Show No. C-026", including the copyrighted animated cartoon entitled "Trick Or Treat";

(g) "Mickey Mouse Club — Show No. C-030", including the copyrighted animated cartoon entitled "The Tortoise And The Hare";

(h) "Mickey Mouse Club — Show No. C-011", including the copyrighted animated cartoon entitled "Clock Cleaners";

(i) "Mickey Mouse Club — Show No. C-082", including the copyrighted animated cartoon entitled "The Autograph Hound";

(j) "Mickey Mouse Club — Show No. C-041", including the copyrighted animated cartoon entitled "The Pointer";

(k) "Mickey Mouse Club — Show No. C-049", including the copyrighted animated cartoon entitled "Hawaiian Holiday"; and

(l) "Disneyland — The Adventures of Chip 'N Dale"

80. Disney has complied in all respects with the Copyright Act with respect to such motion pictures and animated cartoons and the copyrights therein. Disney has applied for and received Certificates of Registration of a Claim to Copyright in each said motion picture and animated cartoon with the following registration numbers and registration dates (and renewal registration numbers and registration dates, where applicable):

Title	*Reg. No.*	*Reg. Date*
"Mickey Mouse Club — Show No. C-001"	MP 31684	10/19/77
"Walt Disney Presents — This Is Your Life, Donald Duck"	LP 19475	6/12/61
"On Vacation — Fantasyland Show No. 26" ("On Vacation With Mickey Mouse And Friends")	LP 8692	7/12/57
"Mickey Mouse Club — Show No. C-028"	MP 31708	11/8/77
"Fire Chief"	LI:10100	12/11/40
Renewal:	R 427857	1/25/68
"Mickey Mouse Club — Show No. C-024"	MP 31707	11/8/77
"Mickey's Parrot"	MI:8723	8/29/38
Renewal:	R 367156	9/7/65
"Mickey Mouse Club — Show No. C-026"	MP 31706	11/8/77
"Trick Or Treat"	LP 2554	5/14/53
"Mickey Mouse Club — Show No. C-030"	Mp 31709	11/8/77
"The Tortoise And The Hare"	MI:5741	7/18/35
Renewal:	R 291829	3/5/62
"Mickey Mouse Club — Show No. C-011"	MP 31711	11/8/77
"Clock Cleaners"	MI:7798	10/1/37
Renewal:	R 342444	8/3/64
"Mickey Mouse Club — Show No. C-082"	MP 31705	11/8/77

Title	*Reg. No.*	*Reg. Date*
"The Autograph Hound"	LI:9351	1/19/40
Renewal:	R 394379	9/26/66
"Mickey Mouse Club — Show No. C-041"	MP 31710	11/8/77
"The Pointer"	LI:8989	7/26/39
Renewal:	R 390658	7/26/66
"Mickey Mouse Club — Show No. C-049"	MP 31676	10/19/77
"Hawaiian Holiday"	MI:7799	10/1/37
Renewal:	R 342445	8/3/64
"Disneyland — The Adventures of Chip 'N Dale"	LP 16261	5/17/60

81. Universal is informed and believes and therefore alleges that within the last three years, Marc Wielage purchased a Betamax and Betamax tapes from a retail television outlet and used them to record and copy, and did record and copy, or caused to be recorded and copied, the following copyrighted motion pictures owned by Universal:

(a) "Frankenstein";
(b) "Bride of Frankenstein";
(c) "Son of Frankenstein";
(d) "The Mummy";
(e) "The Time Of Their Lives";
(f) "This Island Earth";
(g) "The Wolf Man";
(h) "The Mummy's Hand";
(i) "Duel";
(j) "The House of Fear";
(k) "Horsefeathers";
(l) "Duck Soup";
(m) "House of Frankenstein"; and
(n) "Saboteur".

The copyright in each of the foregoing motion pictures was originally secured by, and a Certificate of Registration of

a Claim to Copyright issued to, the parties listed below with the following registration numbers and registration dates:

Title	*Registrant*	*Reg. No.*	*Reg. Date*
"Frankenstein"	Universal Pictures Corporation	LP 2631	11/17/31
"Bride Of Frankenstein"	Universal Pictures Corporation	LP 5500	4/27/35
"Son Of Frankenstein"	Universal Pictures Company, Inc.	LP 8574	1939
"The Mummy"	Universal Pictures Corporation	L 3478	12/15/32
"The Time Of Their Lives"	Universal Pictures Company, Inc.	LP 513	8/23/46
"This Island Earth"	Universal Pictures Company, Inc.	LP 4492	3/15/55
"The Wolf Man"	Universal Pictures Company, Inc.	LP 10910	12/16/41
"The Mummy's Hand"	Universal Pictures Company, Inc.	LP 9854	1940
"Duel"	Universal City Studios, Inc.	LP 43718	8/6/74
"The House Of Fear"	Universal Pictures Company, Inc.	LP 13029	1/5/45
"Horsefeathers"	Paramount Publix Corporation	L 3209	1932
"Duck Soup"	Paramount Productions Inc.	LL 4246	1933
"House of Frankenstein"	Universal Pictures Co., Inc.	L 12971	11/30/44
"Saboteur"	Universal Pictures Co., Inc.	L 11248	5/1/42

82. With respect to each of the aforesaid copyrights for which the original twenty-eight year term has expired, a Certificate of Registration of a Claim to Renewal Copyright was duly applied for and received by the following parties with the following registration numbers and registration dates:

Title	*Registrant*	*Reg. No.*	*Reg. Date*
"Frankenstein"	Universal Pictures Company, Inc.	R 243591	10/12/59
"Bride Of Frankenstein"	Universal Pictures Company, Inc.	R 306308	12/12/62
"Son Of Frankenstein"	Universal Pictures Company, Inc.	R 379441	2/4/66
"The Mummy"	Universal Pictures Company, Inc.	R 258457	6/17/60
"The Time Of Their Lives"	Universal Pictures, a division of Universal City Studios, Inc.	R 560649	9/7/73
"The Wolf Man"	Universal Pictures, a division of Universal City Studios, Inc.	R 455081	1/23/69
"The Mummy's Hand"	Universal Pictures, a division of Universal City Studios, Inc.	R 417137	9/11/67
"The House Of Fear"	Universal Pictures, a division of Universal City Studios, Inc.	R 518424	12/9/71
"Horsefeathers"	EMKA, Ltd.	R 249564	1/8/60
"Duck Soup"	EMKA, Ltd.	R 267241	11/25/60
"House of Frankenstein"	Universal Pictures, a division of Universal City Studios, Inc.	R 519193	12/20/71
"Saboteur"	Universal Pictures, a division of Universal City Studios, Inc.	R 462624	6/13/69

83. Universal has acquired lawful ownership of the aforesaid copyrights and renewal copyrights and is, and at all material times alleged herein has been, the owner of said copyrights and renewal copyrights.

84. Universal and its predecessors in interest have complied in all respects with the Copyright Act with respect to such motion pictures and the copyrights and renewal copyrights therein.

85. The foregoing conduct was without the consent of plaintiffs and constituted infringement upon the copyrights and renewal copyrights in said motion pictures and animated cartoons.

86. The said Betamax and Betamax tapes were manufactured for profit by Sony and were sold for profit by Sony America to said retail television outlet for the purpose of having said retail television outlet sell the Betamax and Betamax tapes for profit to purchasers such as Marc Wielage, with the knowledge and intent that said purchasers would use the Betamax and Betamax tapes to record and copy television shows, including motion pictures produced, copyrighted and owned by plaintiffs. Neither Sony, Sony America, DDBI nor said retail television outlet took any steps to police or control the content of the recordings made by Marc Wielage on said Betamax, although it was within their power to do so.

87. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Plaintiffs request that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Plaintiffs do not have in their possession and are unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, plaintiffs are unable to attach copies thereof to this Complaint.

88. Plaintiffs are informed and believe and therefore allege that Marc Wielage has used his Betamax and Betamax tapes to copy and has copied several other motion pictures owned and copyrighted by plaintiffs.

89. The foregoing acts and conduct of defendants have been without the consent of plaintiffs and constitute infringements of the aforesaid copyrights owned by plaintiffs. As a direct and proximate result of the foregoing acts and conduct of defendants, plaintiffs have been damaged in an amount currently unknown to plaintiffs.

90. Plaintiffs are informed and believe and therefore allege that defendants Sony, Sonam and DDBI, and each of them have derived and received substantial profits from the foregoing wrongful acts and conduct. Plaintiffs are unaware of the exact amount of such profits derived and received by said defendants and plaintiffs will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of plaintiffs, and plaintiffs are entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

91. Marc Wielage threatens and continues to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe plaintiffs' copyrights in the motion pictures owned and copyrighted by plaintiffs.

92. The acts, conduct and threatened acts and conduct of Marc Wielage as hereinabove alleged, have caused and are causing, and will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss

and damage unless defendants Sony, Sony America and DDBI are ordered to take reasonable steps to prevent Marc Wielage from performing the aforesaid acts and conduct.

COUNT VIII

(By Universal Against Sony, Sony America, DDBI And Robinson For Copyright Infringement)

93. Universal hereby refers to paragraphs 1, 2, 4, 5, 7, 11, 12D, 14 through 21, inclusive, 34, and 36 through 41, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

94. Within the last three years, Mr. and Mrs. Clinton Bird purchased a Betamax and Betamax tapes from Associated/Robinson and used them to record and copy, and did record and copy, the following copyrighted motion pictures owned by Universal:

(a) Two episodes from the "Bionic Woman" television series entitled (a) "Fembots In Las Vegas, Part I" and (b) "Fembots In Las Vegas, Part II"; and

(b) an episode from the "Quincy" television series entitled "Who's Who In Neverland".

95. Universal has complied in all respects with the Copyright Act with respect to such motion pictures and the copyrights therein. Universal has applied for and received Certificates of Registration of a Claim to Copyright in each of said motion pictures with the following registration numbers and registration dates:

Title	*Reg. No.*	*Reg. Date*
Two episodes from the "Bionic Woman" television series entitled		
(a) "Fembots In Las Vegas, Part I"	LP 49338	11/8/77
(b) "Fembots In Las Vegas, Part II"	LP 49339	11/8/77
Episode from "Quincy" television series entitled "Who's Who In Neverland"	LP 48967	9/28/77

96. The foregoing conduct was without the consent of Universal and constituted infringements upon the copyrights in said motion pictures.

97. The said Betamax and Betamax tapes were manufactured for profit by Sony and were sold for profit by Sony America to Associated/Robinson for the purpose of having Associated/Robinson sell the Betamax and Betamax tapes for profit to purchasers such as Mr. and Mrs. Clinton Bird. Sony, Sony America and DDBI engaged in the aforesaid conduct and Associated/Robinson sold the aforesaid Betamax and Betamax tapes for profit to Mr. and Mrs. Clinton Bird with the knowledge and intent that said purchasers would use the Betamax and Betamax tapes to record and copy television shows, including motion pictures produced, copyrighted and owned by Universal. Neither Sony, Sony America, DDBI nor Associated/Robinson took any steps to police or control the content of the recordings made by Mr. and Mrs. Clinton Bird on said Betamax, although it was within their power to do so.

98. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Universal does not have in its possession and is unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, Universal is unable to attach copies thereof to this Complaint.

99. Universal is informed and believes and therefore alleges that Mr. and Mrs. Clinton Bird have used their

Betamax and Betamax tapes to copy and have copied several other motion pictures owned and copyrighted by Universal.

100. The foregoing acts and conduct of defendants have been without the consent of Universal and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, Universal has been damaged in an amount currently unknown to Universal.

101. Universal is informed and believes and therefore alleges that defendants Sony, Sonam, DDBI and Associated/Robinson, and each of them have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profit derived and received by said defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

102. Mr. and Mrs. Clinton Bird threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Universal's copyrights in the motion pictures owned and copyrighted by Universal.

103. The acts, conduct and threatened acts and conduct of Mr. and Mrs. Clinton Bird as hereinabove alleged, have caused and are causing, and will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants Sony,

Sony America, Associated/Robinson and DDBI are ordered to take reasonable steps to prevent Mr. and Mrs. Clinton Bird from performing the aforesaid acts and conduct.

COUNT IX

(By Disney And Universal Against Sony, Sony America And DDBI For Copyright Infringement)

104. Plaintiffs hereby refer to paragraphs 1, 2, 3, 4, 5, 11, 12B, paragraphs 14 through 21, inclusive, and paragraphs 69 and 70, hereinabove and incorporate them, each and all, herein by this reference as though set forth in full.

105A. Within the last three years, James Lowe purchased a Betamax and Betamax tapes from a retail television outlet known as Trigger Enterprises and used them to record and copy, and did record and copy, the following copyrighted motion picture owned by Universal: "Psycho". The copyright in such motion picture was originally secured by, and a Certificate of Registration of a Claim to Copyright issued to, Shamley Productions ("Shamley"). The aforesaid Certificate of Registration bears the following registration number and registration date: LP 16674, August 5, 1960. Universal has acquired lawful ownership of said copyright and is, and at all material times alleged herein has been, the owner of said copyright. Universal and Shamley have complied in all respects with the Copyright Act with respect to such motion picture and the copyright therein.

105B. Within the last three years, James Lowe used the aforesaid Betamax and Betamax tapes to record and copy, and did record and copy, or caused to be recorded and copied, the following copyrighted motion pictures owned by Disney, or substantial portions thereof:

(a) "Mickey Mouse Club — Show No. C-003", including the copyrighted animated cartoon entitled "Donald Applecore";

(b) "Mickey Mouse Club — Show No. C-015", including the copyrighted animated cartoon entitled "Pluto's Quinpuplets";

(c) "Mickey Mouse Club — Show No. C-035", including the copyrighted animated cartoon entitled "Modern Inventions";

(d) "Mickey Mouse Club — Show No. C-040", including the copyrighted animated cartoon entitled "Two Chips And A Miss";

(e) "Mickey Mouse Club — Show No. C-044", including the copyrighted animated cartoon entitled "Donald's Better Self"; and

(f) "Mickey Mouse Club — Show No. C-079", including the copyrighted animated cartoon entitled "Spare The Rod".

105C. Disney has complied in all respects with the Copyright Act with respect to such motion pictures and animated cartoons and the copyrights therein. Disney has applied for and received Certificates of Registration of a Claim to Copyright in each said motion picture and animated cartoon with the following registration numbers and registration dates — and renewal registration numbers and registration dates, where applicable):

Title		*Reg. No.*	*Reg. Date*
"Mickey Mouse Club — Show No. C-003"		MP 31682	10/19/77
"Donald Applecore"		LP 1399	1/10/52
"Mickey Mouse Club — Show No. C-015"		MP 31681	10/19/77
"Pluto's Quinpuplets"		M1:7801	10/1/37
	Renewal:	R 338798	5/28/64

Title	*Reg. No.*	*Reg. Date*
"Mickey Mouse Club Show No. C-035"	MP 31679	10/19/77
"Modern Inventions"	M1:7600	7/14/37
Renewal	R 338797	5/28/64
"Mickey Mouse Club — Show No. C-040"	MP 31678	10/19/77
"Two Chips And A Miss"	LP 1597	3/27/52
"Mickey Mouse Club — Show No. C-044"	MP 31677	10/19/77
"Donald's Better Self"	M1:8248	3/18/38
Renewal:	R 360676	5/7/65
"Mickey Mouse Club — Show No. C-079"	MP 31683	10/19/77
"Spare The Rod"	LP 3196	2/4/54

106. The foregoing conduct was without the consent of plaintiffs and constituted infringements upon the copyrights and renewal copyrights in said motion pictures and animated cartoons.

107. The said Betamax and Betamax tapes were manufactured for profit by Sony and were sold for profit by Sony America to said retail television outlet for the purpose of having said retail television outlet sell the Betamax and Betamax tapes for profit to purchasers such as James Lowe, with the knowledge and intent that said purchasers would use the Betamax and Betamax tapes to record and copy television shows, including motion pictures produced, copyrighted and owned by plaintiffs. Neither Sony, Sony America, DDBI nor Trigger Enterprises took any steps to police or control the content of the recordings made by James Lowe on said Betamax, although it was within their power to do so.

108. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies

will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Plaintiffs do not have in their possession and are unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, plaintiffs are unable to attach copies thereof to this Complaint.

109. Plaintiffs are informed and believe and therefore allege that James Lowe has used his Betamax and Betamax tapes to copy and has copied several other motion pictures owned and copyrighted by plaintiffs.

110. The foregoing acts and conduct of defendants have been without the consent of plaintiffs and constitute infringements of the aforesaid copyrights owned by plaintiffs. As a direct and proximate result of the foregoing acts and conduct of defendants, plaintiffs have been damaged in an amount currently unknown to plaintiffs.

111. Plaintiffs are informed and believe and therefore allege that defendants Sony, Sony America and DDBI, and each of them have derived and received substantial profits from the foregoing wrongful acts and conduct. Plaintiffs are unaware of the exact amount of such profits derived and received by said defendants and plaintiffs will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of plaintiffs, and plaintiffs are entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

112. James Lowe threatens and continues to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe plaintiffs' copyrights in the motion pictures owned and copyrighted by plaintiffs.

113. The acts, conduct and threatened acts and conduct of James Lowe as hereinabove alleged, have caused and are causing, and will continue to cause plaintiffs great and irreparable injury which cannot be adequately compensated or measured in money. Plaintiffs have no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants Sony, Sony America and DDBI are ordered to take reasonable steps to prevent James Lowe from performing the aforesaid acts and conduct.

COUNT X

(By Universal Against Sony, Sony America And DDBI For Copyright Infringement)

114. Universal hereby refers to paragraphs 1, 2, 4, 5, 11, 12C, and paragraphs 14 through 21, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

115. Within the last three years, Mr. and Mrs. Geoffrey Soule purchased a Betamax and Betamax tapes from a retail television outlet known as Arco Discounts, and used them to record and copy, and did record and copy, the following copyrighted motion pictures owned by Universal:

(a) "Horsefeathers"; and

(b) "Duck Soup".

The copyright in said motion pictures was originally secured by, and a Certificate of Registration of a Claim to Copyright issued to, Paramount Publix Corporation and Paramount Productions, Inc., respectively. The aforesaid Certificates of Registration bear the following registration numbers and registration dates:

Title	*Reg. No.*	*Reg. Date*
"Horsefeathers"	L 3209	1932
"Duck Soup"	LL 4246	1933

116. Prior to 1960, EMKA, Ltd. acquired lawful ownership of the aforesaid copyrights and the renewal rights therein.

In 1960, EMKA, Ltd. duly applied for and received a Certificate of Registration of a Claim to Renewal Copyright of the aforesaid motion pictures with the following registration numbers and registration dates:

Title	*Reg. No.*	*Reg. Date*
"Horsefeathers"	R 249564	1/8/60
"Duck Soup"	R 267241	11/25/60

117. Universal has acquired lawful ownership of the aforesaid copyrights and renewal copyrights and is, and at all material times alleged herein, has been the owner of said copyrights and renewal copyrights.

118. The foregoing conduct was without the consent of Universal and constituted infringements upon the copyrights in the aforesaid motion pictures and the renewal copyrights therein.

119. The said Betamax and Betamax tapes were manufactured for profit by Sony and were sold for profit by Sony America to said retail television outlet for the purpose of having the said retail television outlet sell the Betamax and Betamax tapes to purchasers such as Mr. and Mrs. Geoffrey Soule, with the knowledge and intent that said purchasers would use the Betamax and Betamax tapes to record and copy television shows, including motion pictures produced, copyrighted and owned by Universal. Neither Sony, Sony America, DDBI nor said retail television outlet took any steps to police or control the content of the recordings made by Mr. and Mrs. Geoffrey Soule on said Betamax, although it was within their power to do so.

120. By reason of the bulk of the aforesaid copyrighted motion pictures, it is impractical to attach copies of said motion pictures to this Complaint. However, such copies will be made available for review thereof as will suit the convenience of the Court. Universal requests that the contents of such motion pictures may be deemed to be a part of this Complaint, to the same extent, and with the same force, as though such motion pictures had been capable of being and had been attached to the Complaint. Universal does not have in its possession and is unable to obtain copies of the aforesaid infringing copies of said motion pictures and, accordingly, Universal is unable to attach copies thereof to this Complaint.

121. Universal is informed and believes and therefore alleges that Mr. and Mrs. Geoffrey Soule have used their Betamax and Betamax tapes to copy and have copied several other motion pictures owned and copyrighted by Universal. Said copies were made without Universal's consent and constitute infringements upon Universal's said copyrights.

122. The foregoing acts and conduct of defendants have been without the consent of Universal and constitute infringements of the aforesaid copyrights owned by Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, Universal has been damaged in an amount currently unknown to Universal.

123. Universal is informed and believes and therefore alleges that defendants Sony, Sonam and DDBI, and each of them have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by said defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the

expense of Universal, and Universal is entitled to an accounting of all profits derived by said defendants, and each of them, from the acts and conduct of defendants as aforesaid.

124. Mr. and Mrs. Geoffrey Soule threaten and continue to threaten to engage in the acts and conduct set forth hereinabove and to continue to infringe Universal's copyrights in the motion pictures owned and copyrighted by Universal.

125. The acts, conduct and threatened acts and conduct of Mr. and Mrs. Geoffrey Soule as hereinabove alleged, have caused and are causing, and will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants Sony, Sony America and DDBI are ordered to take reasonable steps to prevent Mr. and Mrs. Geoffrey Soule from performing the aforesaid acts and conduct.

COUNT XI

(By Disney And Universal Against All Defendants For Declaratory Judgment)

126. Plaintiffs hereby refer to paragraphs 1 through 27, 29, 30, 33 through 37, 39, 40, 43 through 47, 49, 50, 53 through 55, 57, 58, 61 through 64, 66, 67, 69 through 76, 79 through 89, 91, 92, 94 through 100, 102, 103, 105A through 110, 112, 113, 115 through 122, 124 and 125 hereinabove and incorporate them, each and all, herein by this reference as though set forth in full.

127. Plaintiffs are informed and believe and therefore allege that the foregoing named purchasers and owners of Betamax and Betamax tapes, and all other purchasers and owners and future purchasers and owners of Betamax and

Betamax tapes in the United States, have used, are using, and intend to continue to use their Betamax and Betamax tapes to record and copy off of television, and thereby infringe, copyrighted motion pictures owned by plaintiffs. Defendants Sony, Sony America, DDBI and the retail defendants, and each of them, intend and expect that the purchasers, owners and future purchasers and owners of Betamax and Betamax tapes will use their Betamax and Betamax tapes for such purpose in the future.

128. By reason of the foregoing facts, an actual and justiciable controversy has arisen and now exists between plaintiffs and defendants concerning the rights of defendants under the Copyright Act of 1909 and the Copyright Revision Act of 1976 (hereinafter the "United States Copyright Laws"), now and in the future, to manufacture, advertise and sell Betamax for use in recording off of television copyrighted motion pictures owned by plaintiffs in that

(a) Plaintiffs contend

(i) that the present and future use of Betamax and Betamax tapes by all present and future owners thereof in the United States to record off of television copyrighted motion pictures owned by plaintiffs is and will continue to be in violation of the United States Copyright Laws and constitutes and will continue to constitute copyright infringement of plaintiffs' copyrights;

(ii) that the present and future manufacture, advertising or sale of Betamax and Betamax tapes throughout the United States to allow present and future purchasers thereof to record off of television in the United States copyrighted motion pictures owned by plaintiffs makes and will continue to make the manufacturers, advertisers, distributors and sellers of Betamax and Betamax tapes civilly liable to plaintiffs for such copyright infringements; and

(iii) that the present and future demonstration of Betamax to the public by the retail defendants in recording off the air and/or playing back copyrighted motion pictures owned by plaintiffs constitutes and will continue to constitute infringement of plaintiffs' copyrights for which defendants are, and will continue to be, civilly liable to plaintiffs.

(b) Defendants dispute and deny plaintiffs' contentions and contend, among other things,

(i) that the use of Betamax and Betamax tapes by persons in the privacy of their homes to record off of television copyrighted motion pictures owned by plaintiffs for personal private use and not for commercial use does not, and will not in the future, constitute copyright infringement and is, and will continue to be, protected by the doctrine of "fair use" and by the First Amendment to the United States Constitution; and

(ii) that the manufacture, advertising or sale of Betamax to allow purchasers thereof to record off of television copyrighted motion pictures owned by plaintiffs does not, and will not in the future, make the manufacturers, advertisers, distributors and sellers of Betamax and Betamax tapes civilly liable for such copyright infringements.

129. By reason of the claims and contentions made and asserted by plaintiffs and defendants, and because of the public's right to be apprised of the correct state of law, it is necessary that the rights, duties and obligations of plaintiffs on the one hand and defendants on the other hand with respect to the manufacture, advertising, sale and use of Betamax and Betamax tapes be determined by the Court.

COUNT XII

(By Universal Against All Defendants Except William Griffiths For Violation Of 15 U.S.C. §1125(a))

130. This count was previously dismissed by the Court by Order dated March 28, 1977. It is re-pleaded and re-alleged herein for purposes of preserving Universal's rights on appeal.

131. Universal hereby refers to paragraphs 1 through 26, inclusive, 33 through 36, inclusive, 43 through 46, inclusive, 53 and 54 hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

132. Defendants have failed to advise the public that use of Betamax and Betamax tapes to copy copyrighted motion pictures constitutes copyright infringement and violates the rights of copyright owners under the Copyright Act. By engaging in the aforesaid acts and conduct, defendants, and each of them, have encouraged, solicited, aided and abetted the misappropriation of and have misappropriated without the consent of Universal valuable property and other rights of Universal.

133. By engaging in the aforesaid acts and conduct, defendants, and each of them, have misled the public and have caused public confusion, and are likely to continue to cause public confusion and to cause public mistake and to deceive and mislead and confuse the public into believing that the sale of Betamax and Betamax tapes as aforesaid for the purpose of making copies of television shows, including motion pictures owned and copyrighted by Universal and others, is with the permission and consent of Universal and other owners of televised copyrighted motion pictures, and that the use of Betamax and Betamax tapes to make copies of said motion pictures, including those owned and copy-

righted by Universal, does not and will not violate the law or any rights of any persons, including Universal.

134. By the foregoing acts, defendants, and each of them (with the exception of William Griffiths), have used false designations of origin and false descriptions and representations in connection with the advertisement, sale and distribution of goods in interstate commerce in violation of 15 U.S.C. §1125(a).

135. The foregoing acts and conduct of defendants have been without the consent of Universal. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Universal has been damaged in an amount currently unknown to Universal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

136. Universal is informed and believes and therefore alleges that defendants, and each of them (with the exception of William Griffiths), have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by said defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

137. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove unless restrained and enjoined by this Court from doing so.

138. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

COUNT XIII

(By Disney Against All Defendants Except William Griffiths For Violation Of 15 U.S.C. §1125(a))

139. This count was previously dismissed by the Court by Order dated March 28, 1977. It is re-pleaded and realleged herein for the purpose of preserving Disney's rights on appeal.

140. Disney hereby refers to paragraph 1, and paragraphs 3 through 11, inclusive, 16 through 21, inclusive, and 69 through 72, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

141. Defendants have failed to advise the public that use of Betamax and Betamax tapes to copy copyrighted motion pictures constitutes copyright infringement and violates the rights of the copyright owners under the Copyright Act. By engaging in the aforesaid acts and conduct, defendants, and each of them, have encouraged, solicited, aided and abetted the misappropriation of and have misappropriated without the consent of Disney valuable property and other rights of Disney.

142. By engaging in the aforesaid acts and conduct, defendants, and each of them, have misled the public and

have caused public confusion, and are likely to continue to cause public confusion and to cause public mistake and to deceive and mislead and confuse the public into believing that the sale of Betamax and Betamax tapes as aforesaid for the purpose of making copies of television shows, including motion pictures owned and copyrighted by Disney and others, is with the permission and consent of Disney and other owners of televised copyrighted motion pictures, and that the use of Betamax and Betamax tapes to make copies of said motion pictures, including those owned and copyrighted by Disney, does not and will not violate the law or any rights of any persons, including Disney.

143. By the foregoing acts, defendants, and each of them (with the exception of William Griffiths), have used false designations of origin and false descriptions and representations in connection with the advertisement, sale and distribution of goods in interstate commerce in violation of 15 U.S.C. §1125(a).

144. The foregoing acts and conduct of defendants have been without the consent of Disney. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Disney has been damaged in an amount currently unknown to Disney. Disney will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Disney.

145. Disney is informed and believes and therefore alleges that defendants, and each of them (with the exception of William Griffiths), have derived and received substantial profits from the foregoing wrongful acts and conduct. Disney is unaware of the exact amount of such profits derived and received by said defendants and Disney will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, said defendants, and each of them, have been unjustly enriched

at the expense of Disney, and Disney is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

146. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove unless restrained and enjoined by this Court from doing so.

147. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Disney great and irreparable injury which cannot be adequately compensated or measured in money. Disney has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

COUNT XIV

(By Universal Against All Defendants Except William Griffiths For Unfair Competition)

148. Universal hereby refers to paragraphs 1 through 26, inclusive, 33 through 36, inclusive, 43 through 46, inclusive, 53, 54, 81 through 88, 91, 92, 94 through 99, 102, 103, 105A, 106 through 109, 112, 113, 115 through 121, 124, 125, 127, 132, 133, and 135 through 138, inclusive, hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

149. The aforesaid acts and conduct of defendants, and each of them (with the exception of William Griffiths), constitute unfair and fraudulent business practices and unfair competition and a violation of the rights of Universal under

federal law, and the common law, and under California Civil Code §3369 and California Business and Professions Code §17500.

COUNT XV

(By Disney Against All Defendants Except William Griffiths For Unfair Competition)

150. Disney hereby refers to paragraph 1, and paragraphs 3 through 12E, inclusive, 16 through 21, inclusive, 69 through 73, inclusive, 79, 80, 85 through 88, 105B through 109, inclusive, 127, 141, 142, and 144 through 147, inclusive, hereinabove and incorporates them, each and all, therein by this reference as though set forth in full.

151. The aforesaid acts and conduct of defendants, and each of them (with the exception of William Griffiths), constitute unfair and fraudulent business practices and unfair compensation and a violation of the rights of Disney under federal law, and the common law, and under California Civil Code §3369 and California Business and Professions Code §17500.

COUNT XVI

(By Universal Against All Defendants For Intentional Interference With Contractual And Advantageous Business Relationships)

152. Universal hereby refers to paragraphs 1 through 26, inclusive, 33 through 36, inclusive, 43 through 46, inclusive, 53, 54, 81 through 88, 91, 92, 94 through 99, 102, 103, 105A, 106 through 109, 112, 113, 115 through 121, 124, 125, 127, 132 and 133 hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

153. Universal and/or its licensee, MCA Television Limited, a corporation wholly owned by MCA Inc., has

entered into and currently has contracts with the major national television networks (i.e., National Broadcasting Company, Inc., Columbia Broadcasting System, Inc. and American Broadcasting Co.) and various independent television stations by which Universal and/or its licensee, MCA Television Limited, has granted said networks and television stations the exclusive right to exhibit many of said motion pictures one or more times on television.

154. Said contracts are the result of longstanding and continuing business dealings between Universal (and/or its licensee, MCA Television Limited) and said television networks and television stations.

155. The aforesaid contracts and business dealings constitute current and prospective valuable and advantageous business relationships of Universal.

156. Universal is informed and believes and therefore alleges that at all times mentioned herein, all defendants knew of the existence of the aforesaid contracts and advantageous business relationships and engaged in the aforesaid acts and conduct with the intent to injure and otherwise interfere with Universal's aforesaid contractual and advantageous business relationships.

157. Said defendants engaged in the aforesaid acts and conduct without justification and have injured, and interfered, and will in the future injure and interfere, with said contractual and advantageous business relationships and have deprived and will deprive Universal of the full benefits thereof.

158. The aforesaid injury and loss to Universal would not have occurred but for the acts and conduct of said defendants as aforesaid.

159. The foregoing acts and conduct of defendants have been without the consent of Universal. As a direct and

proximate result of the foregoing acts and conduct of defendants, and each of them, Universal has been damaged in an amount currently unknown to Universal. Universal will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Universal.

160. Universal is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Universal is unaware of the exact amount of such profits derived and received by defendants and Universal will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Universal, and Universal is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

161. The defendants, and each of them, threaten and continue to threaten to engage in the act and conduct set forth hereinabove unless restrained and enjoined by this Court from doing so.

162. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Universal great and irreparable injury which cannot be adequately compensated or measured in money. Universal has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

COUNT XVII

(By Disney Against All Defendants for Intentional Interference With Contractual And Advantageous Business Relationships)

163. Disney hereby refers to paragraph 1, and paragraphs 3 through 12E, inclusive, 16 through 21, inclusive, 69 through 73, inclusive, 79, 80, 85 through 88, 105B through 109, inclusive, 127, 141 and 142 hereinabove and incorporates them, each and all, herein by this reference as though set forth in full.

164. Disney has entered into and currently has contracts with National Broadcasting Company, Inc., and various independent third parties by which Disney has granted said network and third parties the exclusive rights to exhibit many of said motion pictures one or more times on television. Disney (and/or its licensees) has also entered into and currently has contracts with various independent television stations by which said television stations have been granted the exclusive right to exhibit many of said motion pictures one or more times on television.

165. Said contracts are the result of longstanding and continuing business dealings between Disney (and/or its licensees) and said television networks and television stations.

166. The aforesaid contracts and business dealings constitute current and prospective valuable and advantageous business relationships of Disney.

167. Disney is informed and believes and therefore alleges that at all times mentioned herein, all defendants knew of the existence of the aforesaid contracts and advantageous business relationships and engaged in the aforesaid acts and conduct with the intent to injure, destroy and otherwise

interfere with Disney's aforesaid contractual and advantageous business relationships.

168. Said defendants engaged in the aforesaid acts and conduct without justification and have injured, and interfered, and in the future will injure and interfere, with said contractual and advantageous business relationships and have deprived, and will deprive, Disney of the full benefits thereof.

169. The aforesaid injury and loss to Disney would not have occurred but for the acts and conduct of said defendants as aforesaid.

170. The foregoing acts and conduct of defendants have been without the consent of Disney. As a direct and proximate result of the foregoing acts and conduct of defendants, and each of them, Disney has been damaged in an amount currently unknown to Disney. Disney will seek leave to amend this paragraph to allege the amount of such damages when the same has been ascertained by Disney.

171. Disney is informed and believes and therefore alleges that defendants, and each of them, have derived and received substantial profits from the foregoing wrongful acts and conduct. Disney is unaware of the exact amount of such profits derived and received by defendants and Disney will seek leave to amend this paragraph when the amount of said profits has been ascertained. As a result of the foregoing, defendants, and each of them, have been unjustly enriched at the expense of Disney, and Disney is entitled to an accounting of all profits derived by defendants, and each of them, from the acts and conduct of defendants as aforesaid.

172. The defendants, and each of them, threaten and continue to threaten to engage in the acts and conduct set forth hereinabove unless restrained and enjoined by this Court from doing so.

173. The acts, conduct and threatened acts and conduct of defendants, and each of them, as hereinabove alleged, have caused and are causing, and unless enjoined and restrained by this Court, will continue to cause Disney great and irreparable injury which cannot be adequately compensated or measured in money. Disney has no adequate remedy at law and will suffer immediate and irreparable injury, loss and damage unless defendants, and each of them, are restrained and enjoined from performing the aforesaid acts and conduct.

WHEREFORE, plaintiffs pray for judgment against defendants, and each of them, jointly and severally, as follows:

1. That defendants, and each of them, and their respective officers, agents, servants, employees and attorneys, and each of them, and all persons in active concert or participation with them, or any of them, be forthwith temporarily and permanently enjoined and restrained from

(a) manufacturing, distributing, selling or offering for sale Betamax or Betamax tapes for use by purchasers thereof to copy or otherwise infringe copyrighted motion pictures owned by plaintiffs;

(b) using Betamax or Betamax tapes to copy motion pictures owned and copyrighted by plaintiffs;

(c) advertising or in any way representing that Betamax and Betamax tapes may be used for the purpose of making copies of television shows, including motion pictures owned and copyrighted by plaintiffs;

(d) exhibiting or playing all videotape copies made by defendants, and each of them, of motion pictures owned and copyrighted by plaintiffs;

and ordered to take all steps possible (as such steps are specifically defined by the Court) to prevent the use of Betamax and Betamax tapes (which have already been sold

in the United States) to record and copy copyrighted motion pictures owned by plaintiffs;

2. That defendants, and each of them, be adjudged to have infringed Universal's copyrights in its motion pictures "Adam 12", "The Sakai Ito Story" (which is an episode of the television series "Major Adams"), "Run Sam, Run" (which is an episode of the television series "Gemini Man"), "Captains And The Kings, Chapter III", "Never Give An Inch" (originally entitled "Sometimes A Great Notion"), "Alpha Caper", "Amelia Earhart", an episode of "Baa Baa Blacksheep" entitled "Presumed Dead", an episode of "Holmes And Yo-Yo" entitled "The Last Phantom", "Frankenstein", "Bride Of Frankenstein", "Son Of Frankenstein", "The Mummy", "The Time Of Their Lives", "This Island Earth", "The Wolf Man", "The Mummy's Hand", "Duel", "The House of Fear", "Horsefeathers", "Duck Soup", two episodes from the "Bionic Woman" television series entitled (a) "Fembots In Las Vegas, Part I" and (b) "Fembots In Las Vegas, Part II", an episode from the "Quincy" television series entitled "Who's Who In Neverland", "Psycho", "House of Frankenstein", "Saboteur", and such other motion pictures as Universal shall prove at trial to have been copied by defendants and purchasers of Betamax and Betamax tapes;

3. That defendants, and each of them, be adjudged to have infringed Disney's copyrights in its motion pictures "Mickey Mouse Club — Show No. C-001", "Walt Disney Presents — This Is Your Life, Donald Duck", "On Vacation — Fantasyland — Show No. 26" ("On Vacation With Mickey Mouse And Friends"), "Mickey Mouse Club — Show No. C-028" (including the animated cartoon entitled "Fire Chief"), "Mickey Mouse Club — Show No. C-024" (including the animated cartoon entitled "Mickey's Parrot"), "Mickey Mouse Club — Show No. C-026" (in-

cluding the animated cartoon entitled "Trick Or Treat"), "Mickey Mouse Club — Show No. C-030" (including the animated cartoon entitled "The Tortoise And The Hare"), "Mickey Mouse Club — Show No. C-011" (including the animated cartoon entitled "Clock Cleaners"), "Mickey Mouse Club — Show No. C-082" (including the animated cartoon entitled "The Autograph Hound"), "Mickey Mouse Club — Show No. C-041" (including the animated cartoon entitled "The Pointer"), "Mickey Mouse Club — Show No. C-049" (including the animated cartoon entitled "Hawaiian Holiday"), "Mickey Mouse Club — Show No. C-003" (including the animated cartoon entitled "Donald Applecore"), "Mickey Mouse Club — Show No. C-015" (including the animated cartoon entitled "Pluto's Quinpuplets"), "Mickey Mouse Club — Show No. C-035" (including the animated cartoon entitled "Modern Inventions"), "Mickey Mouse Club — Show No. C-040" (including the animated cartoon entitled "Two Chips And A Miss"), "Mickey Mouse Club — Show No. C-044" (including the animated cartoon entitled "Donald's Better Self"), "Mickey Mouse Club — Show No. C-079" (including the animated cartoon entitled "Spare The Rod"), "Disneyland — The Adventures of Chip 'N Dale", and such other motion pictures as Disney shall prove at trial to have been copied by defendants and purchasers of Betamax and Betamax tapes;

4. That defendants, and each of them (with the exception of William Griffiths), be adjudged to have competed unfairly with Universal and engaged in unfair and fraudulent business practices in violation of 15 U.S.C. §§1121, 1125(a), 1126 and the law of California;

5. That defendants, and each of them (with the exception of William Griffiths), be adjudged to have competed unfairly with Disney and engaged in unfair and fraudulent

business practices in violation of 15 U.S.C. §§1121, 1125(a), 1126 and the law of California;

6. That defendants, and each of them, be adjudged to have unlawfully and intentionally interfered with the contractual and advantageous business relationships of Universal;

7. That defendants, and each of them, be adjudged to have unlawfully and intentionally interfered with the contractual and advantageous business relationships of Disney;

8. For damages suffered by plaintiffs according to proof adduced at trial;

9. For the profits received by defendants, and each of them, as a result of the acts and conduct of said defendants alleged in this Complaint, and for an accounting from defendants, and each of them, to determine said profits;

10. That defendants, and each of them, be required to deliver to the United States Marshal to be impounded during the pendency of this action all copies of copyrighted motion pictures owned by plaintiffs, or portions thereof;

11. That defendants, and each of them, be required to deliver up on oath for destruction all infringing copies of copyrighted motion pictures owned by plaintiffs;

11A. For a declaration in accord with plaintiffs' contentions set forth in Count XI above, including a declaration that (a) the use of Betamax and Betamax tapes to record off of television copyrighted motion pictures owned by plaintiffs is in violation of the United States Copyright Laws and constitutes copyright infringement, and that the manufacturers, advertisers, distributors and sellers of Betamax and Betamax tapes are civilly liable for such infringements, and (b) the demonstration of Betamax to the public by the retail defendants in recording off the air and playing back copyrighted motion pictures owned by plaintiffs constitutes and

will continue to constitute infringement of plaintiffs' copyrights for which defendants are, and will continue to be, civilly liable to plaintiffs;

12. For costs of suit, including reasonable attorneys' fees, incurred herein; and

13. For such other and further relief as to the Court may seem just and proper pursuant to Federal Rules of Civil Procedure, Rule 54(c).

Dated: July 21, 1978.

ROSENFELD, MEYER & SUSMAN
STEPHEN A. KROFT
JOHN G. DAVIES
EDWIN M. SMITH
By /s/ STEPHEN A. KROFT
STEPHEN A. KROFT
Attorneys for Plaintiffs

(Certificate of service omitted in printing)

Judgment.

United States District Court Central District of California.

(Title omitted in printing).

No. CV 76 3520 F.

Filed: October 2, 1979.

The court has heretofore filed its memorandum opinion which constitutes its findings of fact and conclusions of law pursuant to the provisions of Rule 52(a) of the Federal Rules of Civil Procedure.

Pursuant to the provisions of 28 U.S.C. § 1291 and Rules 58 and 79(a) of the Federal Rules of Civil Procedure,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Each of the plaintiffs' requests for injunctive relief is denied.

2. Each of the plaintiffs' requests for declaratory relief is denied.

3. The plaintiffs' requests for damages and profits are denied.

4. Noncommercial home use recording of material broadcast over the public airwaves does not constitute copyright infringement. Such recording is permissible under the Copyright Acts of 1909 and 1976 and as a fair use of the copyrighted works.

5. No defendant has competed unfairly with either plaintiff or engaged in unfair and fraudulent business practices in violation of 15 U.S.C. § 1125(a) or the laws of California.

6. No defendant has unlawfully and intentionally interfered with the contractual and advantageous business relationships of either plaintiff.

7. None of the retail or corporate defendants is directly, contributorily or vicariously liable for home use copying.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the court finds that there is no just reason for delay and directs that a final judgment shall be entered in accordance with Rules 58 and 79(a) in CV 76 3520 F. In the event that this judgment is determined not to be final, pursuant to 28 U.S.C. § 1292(b), the court declares that this opinion involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation in this case.

IT IS FURTHER ORDERED that the clerk forthwith serve copies of this judgment by United States mail upon counsel for the parties appearing in this action.

Dated this 2nd day of October, 1979.

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

Opposition

Office - Supreme Court, U.S.
FILED
MAY 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1687

IN THE

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF FOR RESPONDENTS UNIVERSAL CITY STUDIOS, INC. AND WALT DISNEY PRODUCTIONS IN OPPOSITION.

STEPHEN A. KROFT,
(Counsel of Record),
JOHN G. DAVIES,
SONDRA E. BERCHIN,
9601 Wilshire Boulevard,
Suite 444,
Beverly Hills, Calif. 90210,
(213) 858-7700,

Attorneys for Respondents Universal City Studios, Inc. and Walt Disney Productions.

Of Counsel
ROSENFELD, MEYER & SUSMAN

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Counterstatement of Questions Presented.*

1. Whether the Court should at this time review a non-final decision of the Court of Appeals interpreting provisions of the Copyright Act, 17 U.S.C. §101 *et seq.*, which Congress is in the process of amending.

2. Whether the statutory prohibition against copying entire copyrighted motion pictures is subject to an implied exception for home videotape recorder ("VTR") copying from television transmissions.

3. Whether the fair use doctrine excuses mass home VTR copying of entire copyrighted motion pictures for purposes of convenience.

4. Whether those who manufacture, market and sell VTR's with the intention and expectation that they will be used primarily for copying entire copyrighted motion pictures are liable for such copying as contributory copyright infringers.

5. Whether this Court should render an advisory opinion concerning the remedy to be imposed by the district court before that court has had an opportunity to fashion a remedy on remand.

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*Respondent Universal City Studios, Inc. ("Universal") is a wholly-owned subsidiary of MCA INC. ("MCA"). MCA and/or Universal have the following partially owned subsidiaries and/or affiliates within the meaning of Supr. Ct. Rule 28.1: Two-Beat Music Corp., JDJN Music Corp., MCA New Ventures, Inc., Discovision Associates, Saticoy Technology, Inc., Universal Pioneer Corporation, Mood Music Company, Inc., Fontaine Music Corp., Roncom Films, Inc., Supreme Music Corporation, Western Costume Co., MPD Leasehold Corp., Afram Films, Inc., American Motion Picture Company (Africa), Inc., Motion Picture Export Association of America, Inc., Cinema International Corporation N.V., CIC International B.V., Pincus-Gil Music Pty. Limited, Leeds Music Hans Gerig KG, Spoone Music Pty. Limited, Tangerine Music Pty. Limited, Leeds Musieck Holland B.V., MCA Music Limited, Eugene Music Limited, Evita Music Limited, Jeeves

6. Whether this Court should review the record below to determine whether the Court of Appeals ignored findings of the district court.

Music Limited, Rowlou Music Limited, Spoone Music Limited, Valley Music Limited, Academy Investments No. 1 Pty. Ltd., United Video International N.V., MCA (Paris) Ltd., Regent Investments Pty. Limited, Town Cinema Investments Pty. Ltd., United International Pictures B.V., Universal-RKO, Oak Industries Joint Venture, Hotel Two Associates, T.E.M. Programs International, USA Network and Optical Programming Associates. Universal and MCA also partially own many companies and/or partnerships formed for the purpose of producing individual motion pictures and/or television programs. These entities are not listed here because of Universal's understanding that they do not fall within the term "affiliates" as used in Rule 28.1.

Respondent Walt Disney Productions' only partially owned subsidiary or affiliate within the meaning of Rule 28.1 is Vista-United Telecommunications, Inc.

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No. 81-1687

IN THE

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF FOR RESPONDENTS UNIVERSAL CITY STUDIOS, INC. AND WALT DISNEY PRODUCTIONS IN OPPOSITION.

Opinions Below.

The non-final decision of the Court of Appeals (Pet. App. 1-30) is reported at 659 F.2d 963 (9th Cir. 1981). The opinion of the district court (Pet. App. 31-117) is reported at 480 F.Supp. 429 (C.D. Cal. 1979).

Jurisdiction.

The judgment of the Court of Appeals was entered on October 19, 1981. A petition for rehearing was denied on January 12, 1982 (Pet. App. 118). The petition for writ of certiorari was filed on March 12, 1982.[1] The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1]This Court granted respondents an extension of time until May 10, 1982, in which to file this Opposition (Resp. App. 1).

Constitutional Provisions and Statutes Involved.

This case involves Article I, §8, cl. 8 of the United States Constitution and several provisions of the Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075, 17 U.S.C. §1 *et seq.* (superseded 1978) ("1909 Act") and the General Revision of Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541, 17 U.S.C. §§101 *et seq.* ("1976 Act"). The pertinent provisions of the 1976 Act are 17 U.S.C. §§101, 106-07, 501, 502(a) and 504. The pertinent provision of the 1909 Act is 17 U.S.C. §1. These constitutional and statutory provisions are set forth in Appendix D to the petition (Pet. App. 119-28).

Counterstatement of the Case.

The non-final decision of the Court of Appeals is neither remarkable nor unique. Applying established copyright principles to the circumstances surrounding VTR sale and use, the Court of Appeals merely reaffirmed that unauthorized copying of entire copyrighted motion pictures, particularly the type of *mass* copying made possible by VTR's, constitutes copyright infringement and that those who induce, cause or materially contribute to such copying are liable therefor. This case thus involves no unsettled question of federal law. It simply involves uncontroverted copyright principles applied to ordinary copying, the most commonplace type of infringement encountered in copyright law.

Respondents own thousands of copyrighted motion pictures, many of which are licensed for television exhibition. Petitioners manufacture, advertise and sell to consumers VTR's under the brand name "Betamax" for the primary purpose of making copies of copyrighted television programming, including copyrighted motion pictures owned by respondents (Pet. App. 25-27). These copies are made

generally in the homes of VTR purchasers from television transmissions.[2]

Respondents brought this action against petitioners[3] alleging that VTR copying constitutes copyright infringement[4] and that petitioners are liable for such infringement under the doctrines of contributory infringement, direct infringement, vicarious liability and unfair competition (Pet. App. 54, 101). All other major producers and distributors of televised motion pictures, *amici curiae* here and in the Court below, joined in respondents' objections to petitioners' activities.[5]

The district court (Ferguson, J.) found for petitioners, holding that VTR copying for private viewing does not violate the Copyright Act because (1) such copying is *impliedly* excepted from the express statutory prohibition against unauthorized copying (Pet. App. 57-65) and, alternatively, (2) such copying is permitted by the fair use doctrine (Pet. App. 66-87). The district court further concluded that even if VTR copying constitutes infringement, (3) petitioners are not liable for such infringement (Pet. App. 89-102), and (4) even if they are liable, respondents nevertheless are entitled to no relief (Pet. App. 102-15). The latter two holdings were based primarily on the court's conclusion that Betamax is a staple article of commerce.

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[2]These in-home copies will hereafter be referred to as either "home video recordings" or "VTR copies."

[3]Respondents also named a VTR owner, William Griffiths, as a nominal defendant.

[4]The district court found that the majority of VTR owners are collecting libraries of VTR recordings, some of which contain several hundred recordings (Pet. App. 43-48). Petitioners' assertion that "this case is only time-shift" (Pet. 17) is therefore incorrect.

[5]C.R. 18/190, 19/191-2, 19/208. It is therefore obvious that petitioners' repeated assertion that over 95% of all television programs may be freely copied without objection (Pet. 21, 23) is unreliable. *See* note 29, *infra*.

The Court of Appeals (Kilkenney, J.) unanimously reversed the district court in all respects. The Court of Appeals first held that under the unambiguous language of the Copyright Act VTR copying constitutes copyright infringement and that the district court contravened congressional intent in finding an implied exception to the express, statutory prohibition against unauthorized copying contained in Section 106 of the Act (Pet. App. 4-12). The Court next held that VTR copying of entire copyrighted motion pictures does not constitute fair use (Pet. App. 12-25). The Court further ruled that petitioners are liable as contributory infringers for VTR copying, concluding that the staple article of commerce theory does not shield petitioners from liability for marketing VTR's (Pet. App. 25-27).

Finally, the Court of Appeals held that respondents are entitled to appropriate relief for petitioners' infringing activities (Pet. App. 27-29). In so holding, the Court noted that "the relief question is exceedingly complex" and that "the district court is in a better position [than the Court of Appeals] to resolve, in an appropriate fashion, the relief question" (Pet. App. 28). The Court of Appeals therefore declined to direct the entry of any particular type of relief, but rather remanded the matter to the district court to fashion an appropriate remedy. Responding to a cross-appeal by petitioners, the Court of Appeals also ruled that before fashioning a final remedy, the district court must conduct further proceedings concerning three affirmative defenses which it did not consider at trial (Pet. App. 30).[6]

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[6]In their cross-appeal petitioners claimed that the district court erred in failing to adjudicate three affirmative defenses — laches/estoppel, copyright invalidity, and misuse/unclean hands. The district court rejected petitioners' offer of proof on their laches/estoppel defense at trial and deferred consideration of the copyright invalidity and misuse/unclean hands defenses until after trial.

In response to the Court of Appeals' decision, several bills were introduced in both Houses of Congress dealing with home video recording. The initial bills seek simply to exempt home video recording from copyright liability without compensating copyright owners.[7] These bills would essentially overturn the decision below. Several subsequent bills, while completely exempting VTR owners from liability, exempt VTR manufacturers and distributors *only* if they pay compulsory royalty fees to copyright owners.[8] These latter bills modify the decision below and retain copyright protection against mass uncompensated VTR copying. Consideration of these bills is moving forward expeditiously. The Senate Committee on the Judiciary commenced hearings on S. 1758 and Amendment 1333 on November 30, 1981, and concluded these hearings on April 21, 1982. Similarly, the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee conducted hearings on all House bills

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[7]S. 1758, 97th Cong., 1st Sess., 127 Cong. Rec. S11810 (daily ed. Oct. 21, 1981); H.R. 4783, 97th Cong., 1st Sess., 127 Cong. Rec. H7504 (daily ed. Oct. 20, 1981); H.R. 4794, 97th Cong., 1st Sess., 127 Cong. Rec. H7504 (daily ed. Oct. 20, 1981); H.R. 4808, 97th Cong., 1st Sess., 127 Cong. Rec. H7591 (daily ed. Oct. 21, 1981); H.R. 5250, 97th Cong., 1st Sess., 127 Cong. Rec. H9928 (daily ed. Dec. 16, 1981).

[8]Amendment No. 1242 to S. 1758, 97 Cong., 1st Sess., 127 Cong. Rec. S15723-24 (daily ed. Dec. 16, 1981); Amendment No. 1333 to S. 1758, 97th Cong., 2d Sess., 128 Cong. Rec. S1675 (daily ed. Mar. 4, 1982); H.R. 5488, 97th Cong., 2d Sess., 128 Cong., Rec. H333 (daily ed. Feb. 9, 1982); H.R. 5705, 97 Cong., 2d Sess., 128 Cong. Rec. H664 (daily ed. Mar. 3, 1982).

Amendment No. 1333 already has twenty-one sponsors, including the Senate majority and minority leaders and whips, and has been endorsed by the United States Coyyright Office. Hearings on Home Video and Audio Legislation Before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (Apr. 21, 1982) (prepared statement of David Ladd, p. 6). H.R. 5705, the House version of Amendment No. 1333, already has over 65 sponsors.

on April 12-14, 1982, and is expected to conclude these hearings in June, 1982.

In the meantime, neither the VTR industry nor the use of VTR's has ground to a halt. Petitioners and all other VTR manufacturers are still selling VTR's and have announced that they will continue such sales as long as they are permitted to do so. Furthermore, in the six years that this case has been pending no suits have been brought against individual VTR owners for VTR copying, and respondents have stated publicly that no such actions will ever be instituted.[9]

REASONS FOR DENYING THE WRIT.

The petition should be denied for several reasons: (1) the Court of Appeals' decision is not final and therefore not ripe for review; (2) Congress is currently addressing the issues raised by petitioners; (3) the issues raised in the petition are neither novel, unsettled nor worthy of consideration by this Court; and, (4) the Court of Appeals' decision does not conflict with the decisions of this or any other Court. Indeed, the Register of Copyrights and several members of Congress have expressed their complete agreement with the Court of Appeals' interpretation of the Copyright

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[9]Hearings on S. 1758 Before the Senate Committee on the Judiciary, 97th Cong., 1st Sess. (Nov. 30, 1981) (testimony of Sid Sheinberg) (unpublished) (unofficial transcript, p. 109); Hearings on Home Video and Audio Recording Legislation Before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, 97th Cong., 2d Sess. (Apr. 12, 1982) (unpublished) (statement of Jack Valenti, p. 32).

Act[10] — and for good reason: the Court of Appeals' decision carefully follows settled law and is correct in all respects.

I.

BECAUSE THE COURT OF APPEALS REMANDED THE CASE TO THE DISTRICT COURT TO CONSIDER THREE AFFIRMATIVE DEFENSES AND TO FASHION A REMEDY THE DECISION BELOW IS NOT FINAL AND THEREFORE NOT RIPE FOR REVIEW.

This Court has stated repeatedly that except in "extraordinary" circumstances it will decline to review non-final decisions because they often "become quite unimportant by reason of the final result or intervening matters."[11] Since the Court of Appeals remanded this case to the district court

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[10]The Register of Copyrights, David Ladd, has stated that recognition of a home video recording exemption would "run counter to the principles of the comprehensive revision of our copyright law in 1976." 127 Cong. Rec. E5148 (daily ed. Nov. 4, 1981). In testimony before the Senate Judiciary Committee, Mr. Ladd, on behalf of the Copyright Office, further stated:

> "Making a copy of an audiovisual work under copyright through the use of a videotape recorder infringes the reproduction right of Section 106. . . . At the time of passage of the 1976 Copyright Act, videotaping was a known technology, yet no specific exemption was included in the legislation to exempt the practice in the home. . . . None of the purposes articulated in the [fair use] provision [§107] fits home videotaping. . . . [T]he four factors listed in Section 107 would not excuse unrestricted videotaping, as the Ninth Circuit held in the *Betamax* case." Hearings on Home Video and Audio Legislation Before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (Apr. 21, 1982) (prepared statement of David Ladd, pp. 19, 23, 25).

Similarly, Rep. Don Edwards, the sponsor of two pending bills, has stated that "[t]he Ninth Circuit's interpretation of the law was correct." 128 Cong. Rec. H322 (daily ed. Feb. 9, 1982).

[11]*American Construction Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893). *Accord, Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ [of certiorari] is not issued until final decree").

to consider three unresolved affirmative defenses and to fashion an appropriate remedy, the decision below is not final and therefore is not ripe for review. Indeed, the reasons for application of the normal rule against review of non-final decrees are particularly strong here.

First, if upheld by the district court, petitioners' three remaining affirmative defenses would bar respondents' statutory infringement claims. These affirmative defenses could also have application to similar potential litigation involving other parties.[12] Thus, if petitioners prevail on their remaining defenses, it may never become necessary for this Court to consider the issues presented by the current petition.

Second, the remedy which the district court will fashion on remand could adequately accommodate the interests of all parties so that none will thereafter seek review by this Court. Moreover, as petitioners appear to recognize (Pet. 9, 11, 23), such a remedy would likely provide an acceptable resolution to similar potential lawsuits. More importantly, the issues raised by petitioners are integrally connected to the remedy questions which remain to be addressed on remand.[13] If considered at all by this Court, these interrelated

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[12]Petitioners' contrary assertion (Pet. 11) is without foundation. Indeed, their misuse/unclean hands defense expressly implicates all VTR manufacturers and distributors and all major motion picture copyright owners (C.R. 18/179, pp. 17-21). Until the district court definitively rules on these remaining defenses, it is not possible to predict that they will have application only to this case.

[13]For example, the extent of petitioners' knowledge as contributory infringers may affect the amount of statutory damages awarded. *See* 17 U.S.C. §504(c)(2); Pet. App. 26. Similarly, the circumstances examined in the fair use analysis (*e.g.*, the extent of harm to the copyright owner and the substantiality of the copying) may affect the amount of this award. *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 161 (1976), [1976] U.S. Code Cong. & Ad. News 5777 (hereinafter "1976 House Report"). Petitioners are therefore in error in asserting (Pet. 12) that the remand in this case merely involves incidental questions of relief unrelated to the issues presented in their petition.

issues should be addressed after remand in a single proceeding rather than piecemeal.

Third, as discussed more fully in Section II, *infra*, it is likely that before this case becomes ripe for decision by this Court after remand, Congress will pass legislation disposing for the future of the issues now raised by petitioners. In this event, it would be unnecessary for this Court to consider those issues.

Not only is this case not ripe for review, but petitioners have failed to demonstrate that "extraordinary" circumstances exist which compel departure from the normal rule against review of non-final decrees. Petitioners claim that immediate review is necessary here for two reasons: to prevent countless suits against individual VTR owners and to avoid destruction of the entire VTR industry (Pet. 2, 9, 11, 13, 23). This misleading parade of horribles does not provide an adequate basis for interlocutory review.

During the six years that this case has been pending, neither respondents nor any other copyright owner has sued any individual VTR owner for VTR copying. Nor is there any intention of doing so (*see supra*, at p. 6, lines 14-17). Thus, intervention by this Court is unnecessary to protect the interests of individual VTR owners.

It is also inaccurate to presage the demise of the VTR industry before the district court fashions a remedy. Petitioners' own actions conclusively demonstrate that the VTR industry will not be destroyed during the pendency of a remand in this case. They are marketing VTR's and have announced that they will continue to do so unless enjoined on remand by the district court (*see supra*, at p. 6, lines 10-14).[14] Moreover, if the district court orders payment of con-

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[14]Even if such an injunction were to issue, petitioners could seek a stay of the injunction pending appellate review. *See* Fed.R.Civ.P. 61(c); Fed.R.App.P. 8(a); 28 U.S.C. §2101(f).

tinuing royalties instead of a permanent injunction (Pet. App. 28-29), VTR sales will continue after remand without interruption. Such sales will also continue unabated if, as is likely, Congress passes any one of the pending bills.

Thus, the reasons advanced by petitioners for immediate review are neither reliable nor accurate and afford no basis for treating the decision below differently from any other ordinary non-final decree.

II.

PENDING CONGRESSIONAL LEGISLATION WILL LIKELY DISPOSE OF THE ISSUES BEFORE THIS COURT.

This Court has routinely refused to review cases where congressional modification of the statutory scheme in issue makes consideration by the Court unnecessary or minimizes the future importance of the question presented.[15] Here, Congress has not yet enacted new legislation. However, the Senate has already concluded its hearings, and it seems clear from Congress' expeditious and serious consideration of the pending bills that such legislation is imminent.[16] It is also clear that any one of the bills, if enacted, would dispose of the issues raised in the petition for the future and render a decision by this Court unnecessary and of virtually no general effect.[17]

Given the imminence of congressional action, this Court should defer to the legislative process already underway and deny review at this time. Such judicial restraint is particularly appropriate here because even if Congress fails to

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[15]*E.g., Cook v. Hudson*, 429 U.S. 165, 165-66 (1976) (per curiam); *Sanks v. Georgia*, 401 U.S. 144, 149-53 (1971); *District of Columbia v. Sweeny*, 310 U.S. 631 (1940).

[16]*See supra*, at pp. 5-6.

[17]Petitioners' individual interests in securing an adjudication by this Court regarding their past conduct under a superseded statute would have no general significance warranting Supreme Court review.

act, this Court will have adequate opportunity to review after remand the precise issues currently raised by petitioners.

III.

THE COURT OF APPEALS' DECISION IS CORRECT, IS IN HARMONY WITH DECISIONS OF ALL OTHER COURTS, AND RAISES NO ISSUES WORTHY OF REVIEW BY THIS COURT.

A. The Court of Appeals Correctly Interpreted the Statutory Provisions of the Copyright Act to Prohibit Home Video Recording.

Petitioners do not dispute the Court of Appeals' conclusion that on its face the language of both the 1909 and 1976 Acts unambiguously proscribes home video recording of copyrighted motion pictures (Pet. App. 4-12; Pet. 14). Rather, they assert that review is warranted because the Court of Appeals erred in refusing to find in the legislative history of the 1976 Act an *implied* exemption permitting such recording (Pet. 14-16).[18] As the following discussion demonstrates, this refusal to imply an exemption to clear statutory language (Pet. App. 6-12) was correct.

The only exemptions from liability contained in the 1976 Act are set forth in Sections 107-118. *See* 17 U.S.C. §106; 1976 House Report 61, [1976] U.S. Code Cong. & Ad. News 5674. Significantly, none of these exemptions permits uncompensated reproduction of copyrighted works for "private use." Indeed, with one narrow exception, none permits reproduction of copyrighted motion pictures for *any*

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[18]Petitioners do not assert that this legislative history requires recognition of an implied home VTR recording exemption in the 1909 Act (*see* Pet. App. 14).

purpose.[19] This carefully constructed statutory scheme in and of itself demonstrates that Congress did not intend, expressly or impliedly, to exempt VTR copying from statutory copyright liability. The legislative history of the 1976 Act further supports this conclusion.[20] Indeed, as the Court of Appeals noted (Pet. App. 8-9), this history underscores Congress' special concern for the protection of motion pictures in all circumstances.[21]

This ordinary issue of statutory construction does not warrant review by this Court.[22]

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[19]Section 111(e) permits limited copying of motion pictures by offshore cable systems for temporary use outside the continental United States.

[20]Petitioners err in asserting that the Court of Appeals refused to examine legislative history (Pet. 14). Although the Court held that resort to legislative history is unnecessary to interpret the unambiguous provisions of the 1976 Act, it nonetheless examined this history and found therein no support for the implied exemption urged by petitioners (Pet. App. 4-12).

[21]*E.g.*, H.R. Rep. No. 83, 90th Cong., 1st Sess. 61 (1967) ("[t]he committee concluded that the special nature of motion pictures and audiovisual works makes them exceptionally vulnerable to copyright impairment under an ephemeral recording exemption, and therefore removed them from the scope of section 112"). Congress expressed this concern with full awareness of the capabilities of VTR technology. *See* Pet. 15; Pet. App. 9 (quoting 1976 House Report 77, [1976] U.S. Code Cong. & Ad. News 5690-91).

[22]Ignoring the unequivocal provisions of the 1976 Act, petitioners claim that the Court of Appeals should have found an implied exemption in the Act for VTR copying based on (a) the legislative history of an entirely different statute, the Sound Recording Act of 1971, and (b) isolated, extemporaneous references to VTR's made by the Register of Copyrights and others while discussing problems other than VTR copying (Pet. 15-16). However, the Court of Appeals correctly found that Congress never intended the Sound Recording Act to affect rights in motion pictures (Pet. App. 9-12; H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 5-6 (1971), [1971] U.S. Code Cong. & Ad. News 1570-71). The Court further correctly found that casual comments in the legislative history concerning matters unrelated to VTR copying do not represent the type of considered review by Congress as a whole which is necessary to imply an exemption to unambiguous statutory language (Pet. App. 11-12). In so holding, the Court of Appeals followed uncontroverted principles of statutory construction. *T.V.A. v. Hill*, 437 U.S. 153, 191-93 (1978); *Gemsco v. Walling*, 324 U.S. 244, 260 (1945); *Libby Rod & Gun Club v. Poteat*, 594 F.2d 742, 746 (9th Cir. 1979).

B. The Court of Appeals' Holding That Home Video Recording Does Not Constitute Fair Use Is Correct and Does Not Conflict With Any Other Decision.

The Court of Appeals relied on two independent grounds in ruling that VTR copying does not constitute fair use. First, following established case law, it held that an unauthorized use — such as VTR copying — which does not involve independent creativity for purposes such as criticism, comment, news reporting, teaching, scholarship or research, *i.e.*, a "productive use," can never constitute fair use (Pet. App. 15-18).[23] Alternatively, the Court held that under a balancing of the traditional four fair use criteria (*see* 17 U.S.C. §107), VTR copying is not fair use even if under some circumstances other nonproductive uses could constitute fair use (Pet. App.18-25). Petitioners seek review of each of these holdings, recognizing that review of both is necessary to alter the result below.

In an attempt to elevate the "productive use" requirement of the fair use doctrine to a status worthy of review by this Court, petitioners assert that in applying this established requirement, the Court of Appeals rendered a decision in conflict with the decision of the Court of Claims in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided court*, 420 U.S. 376 (1975)

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[23]It has long been settled that an unauthorized use must be for a productive purpose such as criticism, comment, news reporting, teaching, scholarship or research to qualify as fair use. 17 U.S.C. §107; *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009.

It is also clear that without some independent creation by the unauthorized user there can be no fair use. *Benny v. Loew's, Inc.*, 239 F.2d 532, 536 (9th Cir. 1956), *aff'd by equally divided court*, 356 U.S. 43 (1958); L. Seltzer, *Exemptions And Fair Use In Copyright* 24 (1978); *see Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

(library photocopying by the United States government from medical journals for medical research purposes) (Pet. 22-23). In particular, petitioners assert that unlike the decision below, *Williams & Wilkins* refused to require a productive use as a necessary basis for the fair use defense (Pet. 22). As the following discussion demonstrates, there is no conflict between these decisions.

Although the Court of Appeals criticized *Williams & Wilkins* — as have many others[24] — it correctly found *Williams & Wilkins* "clearly distinguishable" (Pet. App. 16-17), thus avoiding the "head-on clash" which petitioners perceive (Pet. 22) between the Court of Appeals and the Court of Claims. As the Court of Appeals noted, in *Williams & Wilkins*, the purpose of the unauthorized use — library photocopying by the United States Government — was to advance science, medicine and medical research, and thus was the type of productive use required by the fair use doctrine. *See* note 23, *supra*. VTR copying does not further either science, research or scholarship. Hence, on its facts this case is distinguishable from, and does not conflict with, *Williams & Wilkins*.[25]

Moreover, *Williams & Wilkins*, which was decided under the 1909 Act, has little, if any, application under the 1976 Act under which the instant case was decided. The Court in *Williams & Wilkins* recognized that its decision was a "holding operation" designed to protect library photocopying by the United States Government until "Congress enacted its preferred solution." S.Rep. No. 94-473, 94th Cong., 1st Sess. 71 (1975) (hereinafter "1975 Senate Re-

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[24]*E.g.*, Nimmer, *Photocopying & Record Piracy: Of Dred Scott And Alice In Wonderland*, 22 U.C.L.A. L. Rev. 1052, 1054 (1975).

[25]Even the district court held that *Williams & Wilkins* "has little precedential value [and] is specifically limited to its unique factual situation" (Pet. App. 73).

port'') (quoting *Williams & Wilkins, supra*, 487 F.2d at 1363). In response to *Williams & Wilkins*, and because ''the several opinions in the *Wilkins* case [gave] the Congress little guidance as to the [then] current state of the law on fair use,'' Congress included a specific provision in the 1976 Act (17 U.S.C. §108) dealing with library photocopying. In so doing, Congress sharply limited the permissible scope of such activities and resolved the confusion created by *Williams & Wilkins* under the 1909 Act. 1975 Senate Report 71. When Congress acted on this issue in 1976, the ''holding operation'' of *Williams & Wilkins* came to an end and the Court of Claims' approach to the fair use doctrine lost its vitality.

Petitioners next assert that this Court should grant review to correct the Court of Appeals' alleged improper application of the four traditional fair use criteria to VTR copying (Pet. 17-21). Petitioners do not claim that the Court below rested its decision on incorrect legal principles. They merely ask this Court to reapply the undisputed legal principles to the facts of this case. In particular, petitioners claim that the Court of Appeals ignored several findings of the district court and that this Court should correct this error. These issues are not worthy of review. This Court does not customarily grant certiorari to correct the improper application of settled rules of law to individual cases. R. Stern & E. Gressman, *Supreme Court Practice* 298 (5th ed. 1978). Petitioners have shown no reason to depart from the Court's customary practice in this case. Moreover, the Court of

Appeals correctly applied the fair use criteria and did not ignore any relevant findings.[26]

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[26]For example, in analyzing the first fair use factor, the purpose and character of the infringing use, the Court of Appeals correctly ruled that copying for convenience, such as VTR copying (R.T. 965; PX 113), does not qualify as fair use. 1975 Senate Report 66 ("[t]he committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances, be considered 'fair use' "). That such copying may increase access to the infringed works, as claimed by petitioners (Pet. 18-19), is irrelevant (Pet. App. 19). Copyright infringement *always* increases access to the infringed work. If this fact alone justified copying as fair use, all infringements would be fair use.

In analyzing the second factor, the nature of the copyrighted works involved, the district court's only finding was that respondents voluntarily transmit their works over public airwaves (Pet. App. 79-80). The Court of Appeals correctly held that this finding was legally immaterial (Pet. App. 20-21). The proper focus under this factor is on the intrinsic qualities of the infringed work, not on the medium of its presentation. *See United States v. Loew's, Inc.*, 371 U.S. 38, 48 (1962) ("[a] copyrighted feature film does not lose its legal or economic uniqueness because it is shown on a television rather than a movie screen").

As to the third factor, the amount of the taking involved, the district court found that VTR copying "usually involves copying the entire work" (Pet. App. 83). Typically, this fact alone precludes a finding of fair use. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756, 758 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962). Accordingly, the Court of Appeals properly ruled that this factor weighed against the fair use defense (Pet. App. 21-22).

Finally, in its analysis of the fourth factor, the effect of home recording on the potential market for or value of respondents' works, the Court of Appeals relied on the district court's finding (Pet. App. 81) that VTR copies are "used for the same purpose as the original[s]" (Pet. App. 23, n. 13). Under settled judicial authority such a finding establishes the existence of potential harm as a matter of law for fair use purposes. *Meeropol v. Nizer, supra*, 560 F.2d at 1069; *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Prods., Inc.*, 479 F.Supp. 351, 360-61 (N.D. Ga. 1979). The Court of Appeals also correctly ruled (Pet. App. 23-24) that the district court's finding that VTR copying had caused "no measurable harm to date" (Pet. App. 50, 76) is legally immaterial because the proper inquiry is not whether VTR infringements have caused past damage, but is whether such mass infringements will *tend* to affect any *potential* market for or value of the infringed works. *Meeropol v. Nizer, supra*, 560 F.2d at 1069; *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Prods., Inc., supra*, 479 F.Supp. at 361; *Meredith Corp. v. Harper & Row Publishers, Inc.*, 378 F.Supp. 686, 689 (S.D. N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974); *see* 1975 Senate Report 65. The district court did not (and rationally could not) find that VTR copies will not tend to affect any potential market for, or value of, respondents' copyrighted works. Indeed, the district court found that respondents would have to compete with such copies in the marketplace (Pet. App. 78, 116), thereby underscoring the potential for such harm (Pet. App. 23-24).

C. The Court of Appeals' Conclusion That Petitioners Are Contributory Infringers Is Correct and Does Not Conflict With Any Decision of This Court.

In holding petitioners liable as contributory infringers, the Court of Appeals applied uncontroverted copyright doctrine (Pet. 24; Pet. App. 27).[27] Petitioners do not ask this Court to overturn that doctrine. They assert that review is warranted because the Court of Appeals' application of the contributory infringement doctrine allegedly conflicts with decisions of this Court (Pet. 23-25) and ignores the district court's conclusion that VTR's are staple articles of commerce.[28] These assertions are not well taken.

The decisions relied upon by petitioners are not only consistent in all respects with the Court of Appeals' decision, they dramatically underscore its validity. In *Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911), the only copyright case cited by petitioners, this Court held that the seller of an unauthorized film version of a copyrighted story was contributorily liable for his customers' infringing exhibitions of the film. In so holding, the Court reasoned:

> "The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story. That was the most conspicuous use

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[27] "One who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer'." *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

[28] Petitioners also assert that the Court of Appeals disregarded findings by the district court that petitioners did not "in any way" induce or cause to be made any of the copies at issue (Pet. 24). The district court made no such findings. It found, and petitioners conceded, that petitioners' overall activities contribute to all recordings made on Betamax (Appellees and Cross-Appellants' Brief, p. 70; Pet. App. 97). More importantly, petitioners' assertion is irrelevant for purposes of certiorari, since this Court does not grant certiorari merely to review evidence and discuss specific facts. *See* § III.E, *infra*.

> for which they could be used, and the one for which especially they were made." *Id.* at 62-63.

Similarly, in *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48-49 (1912), *overruled on oth. grds.* in *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917), a case interpreting patent law, the Court held that the seller of an article capable of both infringing and non-infringing uses is liable for contributory patent infringement if he "intends and expects" that article to be used for infringing purposes, particularly when the infringing use is the "most conspicuous use" of the product and the one for which it is advertised.

The Court of Appeals in the instant case engaged in an analysis virtually identical to *Kalem* and *Henry*, finding petitioners liable for infringing VTR recordings because, as stipulated by petitioners (R.T. 1778-79), Betamax is "manufactured, advertised, and sold for the *primary purpose* of reproducing [copyrighted] television programming" and because petitioners

> " 'know' that the Betamax will be used to reproduce copyrighted materials. In fact, that is the most conspicuous use of the product. That use is intended, expected, encouraged, and the source of the product's consumer appeal. The record establishes that [petitioners] knew and expected that Betamax's major use would be to record copyrighted programs off-the-air" (Pet. App. 25-26, 27).

The court below thus fully adhered to this Court's decisions in *Kalem* and *Henry*.

The Court of Appeals' decision is also consistent with the final case cited by petitioners, *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964). Interpreting the patent statute, this Court held in *Aro* that the seller of a staple article of commerce cannot be liable

for contributory patent infringement if the staple article "is suitable for *substantial* non-infringing uses." *Id.* at 485-88. In the instant case, the Court of Appeals, citing *Aro*, merely held that the district court's reliance on the staple article of commerce theory was inappropriate because, among other reasons, VTR's are not suitable for *substantial* non-infringing uses (Pet. App. 25-26). Despite the inferences in the petition to the contrary, the district court did not find otherwise (Pet. App. 97, 114).[29] Accordingly, the Court of Appeals' decision is in complete harmony with *Aro*.

It is thus clear that contrary to petitioners' unexplained assertion (Pet. 23-25), the Court of Appeals did not hold petitioners liable "per se" as contributory infringers for the mere marketing of alleged staple articles of commerce. Rather, it imposed liability based on a standard application of the doctrine of contributory copyright infringement.[30]

D. It Would Be Premature for This Court to Determine the Remedy to Be Imposed in This Case Before the District Court Has Ordered a Remedy on Remand.

The fourth question presented for review — whether the district court, after remand, may order as a remedy in this case the payment of a continuing royalty in lieu of a per-

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[29]The district court did find that VTR's are capable of *some* potential non-infringing uses (Pet. App. 104, 106-7, 114). However, it stopped short of finding that these uses were *substantial* (Pet. App. 97, 114) because the record established that such "potential" uses were negligible, constituting far less than 9% of all uses of Betamax (*See* Appellants' Opening Brief, pp. 52-53). Without this finding of substantial non-infringing uses, the district court's conclusion that VTR's are staple articles of commerce was insufficient to absolve petitioners of liability.

[30]Respondents assert that petitioners are also liable under the doctrines of vicarious liability, direct infringement and unfair competition. *See supra*, at p. 3. Since the Court of Appeals did not reach these issues, even if this Court were to disagree with the Court of Appeals' contributory infringement holding, it would remain necessary to consider these other theories of liability.

manent injunction (Pet. 26) -- is premature. Indeed, at this point the issue posed is purely hypothetical. The Court of Appeals did not order the district court to enter such a remedy. Rather, recognizing the difficulties posed by the remedy question, the Court of Appeals simply remanded the case for the fashioning of an appropriate remedy, noting that the district court might consider whether a continuing royalty would be "an acceptable resolution in this context" (Pet. App. 28-29).[31] Since the district court has not yet considered the remedy question, any pronouncement by this Court concerning the issue would be wholly advisory and without the benefit of a factual record. This issue therefore is not ripe for review.

E. The Question Whether the Court of Appeals Ignored Relevant Findings of the District Court Is Not Worthy of Review.

The last issue presented for review is whether this Court should exercise its power of supervision to correct the Court of Appeals' alleged disregard of the district court's findings of fact (Pet. 26-28). As previously discussed, the Court of Appeals did not disregard any relevant findings. *See* notes 26, 28 and 29 & accompanying text, *supra*. Moreover, petitioners in essence ask this Court to review the evidence contained in 3350 pages of trial transcript and in hundreds of exhibits to determine whether the Court of Appeals did, in fact, ignore relevant fact findings which were not clearly erroneous. However, as this Court frequently has noted, it "do[es] not grant a certiorari to review evidence and discuss

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[31]Petitioners assert that there is no statutory authority for a continuing royalty (Pet. 26). To the contrary, 17 U.S.C. §502(a) authorizes the district court to issue "final injunctions on such terms as it may deem reasonable." Presumably, such terms could include withholding an injunction if an adequate continuing royalty is paid.

specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Accord, General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). Petitioners have demonstrated no reason to depart from this rule in this case.

IV.
CONCLUSION.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN A. KROFT,
(Counsel of Record),
JOHN G. DAVIES,
SONDRA E. BERCHIN,
Attorneys for Respondents
Universal City Studios, Inc. and
Walt Disney Productions.

Of Counsel:
ROSENFELD, MEYER
& SUSMAN.

APPENDIX 1.

OFFICE OF THE CLERK, SUPREME COURT OF THE UNITED STATES, WASHINGTON, D.C., 20543.

March 22, 1982.

Sondra E. Berchin, Esq., Rosenfeld, Meyer & Susman, 9601 Wilshire Boulevard, Beverly Hills, California 90210.

RE: Sony Corporation of America, et al. v. Universal City Studios, Inc., etc., et al. No. 81-1687.

Dear Ms. Berchin:

Your request of March 19, 1982 for an extension of time within which to file a response to the petition for a writ of certiorri in the above-entitled case has been grnted, and your time has been extended to and including May 10, 1982.

Very truly yours,
ALEXANDER L. STEVAS, Clerk
By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

rjb
cc: Dean C. Dunlavey, Esq.

Petitioner's Reply Brief

Supreme Court, U.S.
FILED
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No. 81-1687

IN THE

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

DEAN C. DUNLAVEY,
(Counsel of Record),
DONALD E. SLOAN,
GIBSON, DUNN & CRUTCHER,
515 South Flower Street,
Los Angeles, Calif. 90071,
(213) 488-7000,
Attorneys for Petitioners, Sony Corporation of America, et al.

Of Counsel:
MARSHAL RUTTER,
RUTTER, EBBERT & O'SULLIVAN,
Suite 2200,
1900 Avenue of the Stars,
Los Angeles, Calif. 90067,
(213) 879-9494.

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PETITIONERS' REPLY BRIEF.

A listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of each corporate petitioner has been included in the petition; it currently is still accurate (Sup. Ct. Rule 28.1).

This Reply Brief is filed pursuant to Rule 22.5, .6, Sup. Ct. Rules -- it is addressed solely to an argument, first raised in respondents' Brief in Opposition and based substantially on events transpiring since the Petition was filed, that "Pending Congressional legislation will likely dispose of the issues before this Court" and that "such legislation is imminent"[1/] (emphasis added; Br. Opp. 10 -- see also pp. 5, 6, 9).

It is correct that bills pertaining to free off-the-air home VTR recording are pending both in the House of Representatives and in the Senate, and that both House and Senate Committees have held hearings thereon since the Petition was filed (see Br. Opp. 5-6, fn. 7, 8).

[1/] The limitation of this Reply Brief to this one argument does not imply petitioners' concurrence with the correctness of other misstatements or arguments in respondents' Brief in Opposition.

The initial such bills were spontaneous on the part of the legislators who introduced them; they provide an express exemption for home VTR recording.[2/] Subsequent bills or "amendments", spawned and intensely lobbied for by respondents inter alios, provide for highly controversial royalty fees on VTRs and tapes -- and, in turn, have themselves been amended to further entail comparably controversial proposed royalties on audio recorders and tapes, as well as alteration of the "first sale" doctrine.[3/]

[2/] S. 1758 has 14 sponsors, including Strom Thurmond (D. So. Car.), Chairman of the Senate Judiciary Committee, and three other members of that committee; the corresponding H.R. 4808 has over 98 sponsors, including the House majority whip.

[3/] For relative support of the initial and subsequent bills, compare fn. 2, supra, with Br. Opp. p. 5, fn. 8.

Considering the diametrically opposed nature of the bills and the appreciable support for each, and the congested condition of Congress' calendar between now and the end of the current session, it is gross overreaching and overstatement for U/D to represent to this Court that any "such legislation is imminent". The legislative process has in no way neared completion. The House Subcommittee on Courts, Civil Liberties and the Administration of Justice has scheduled at least one further hearing in the latter half of June. There is no indication by either the House or Senate that any of the bills will be voted on even at the committee level in the foreseeable future.

One of the major themes in the Congressional debate over the issue is the interpretation of the current law as it

applies to off-the-air videotaping of television programs. Only this Court can clarify the uncertainties created by the lower courts' decisions, and it should do so now so as to assure that such debate can be pursued (if at all) under the correct premises.

Moreover, none of the bills even addresses, let alone "disposes of", those "Questions Presented" herein arising from the Court of Appeals' limitation of "fair use" to productive use, nor from its introduction of a "compulsory license/continuing royalty" remedy into copyright law.

Contrary to respondents' assertion that "this Court should defer to the legislative process already underway" (Br. Opp. p. 10):

Rep. Kastenmeier[4/] has said "that

4/ D. Wisc. - Chairman, House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee.

he favors giving courts time to act before legislating" (TV Digest, April 26, 1982, p. 10);

Universal's president told the Senate Judiciary Committee on November 30, 1981 that "the Sony-Betamax case . . . will continue in the courts . . . in our judgment there is present and existing jeopardy which the present Congress cannot do much about . . . ."; and

Newsweek magazine reported "Most likely . . . Congress will duck the issue as long as possible . . . hoping it will be settled by the Supreme Court" (April 26, 1982, p. 72).

The Court of Appeals effectively held a trial de novo with the parties in absentia, contravened the district court's findings of fact based on evidence with "facts" drawn from assumptions and state-

ments found in treatises and law review articles, and committed errors of law giving rise to five substantial "Questions Presented". The record number of amici curiae at the petition stage, on both sides, vividly emphasizes the importance of the far-reaching problems which the Court of Appeals has created and which only this Supreme Court (and not Congress) can and should rectify.

Respectfully submitted,

DEAN C. DUNLAVEY
(Counsel of Record),
DONALD E. SLOAN,

Attorneys for Petitioners,
Sony Corporation of
America, et al.

Of Counsel:
MARSHALL RUTTER

May 23, 1982

Amicus Brief

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Michael H. Cardozo
Counsel of Record

1001 Connecticut Ave, N.W.
Washington, D.C. 20036
(202) 872-1401

August W. Steinhilber
Co-Counsel

1055 Thomas Jefferson St., N.W
Washington, D.C. 20007
(202) 337-7666

Attorneys for Amicus Curiae
Ad Hoc Committee
on Copyright Law

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BRIEF OF AMICUS CURIAE
AD HOC COMMITTEE ON COPYRIGHT LAW
IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

The Ad Hoc Committee on Copyright Law (Ad Hoc Committee), pursuant to Rule 36 of the Rules of this Court, files this brief amicus curiae in support of the petition for writ of certiorari. Consent in writing to the filing of this brief has been obtained from all parties and a copy has been lodged with the clerk of the Court.

The interest of the Ad Hoc Committee arises out of the following circumstances.

The Ad Hoc Committee on Copyright Law was first organized when Congress

started to hold hearings on a general revision of the copyright law about twenty years ago. The Committee consists of non-profit organizations representing virtually every school, college and library, public and private, and from kindergarten through graduate education, throughout the country. The names of the current participants in the Committee are listed in the appendix. The purpose of the Committee was to communicate to Congress the effect on education and scholarship of various proposals for amending the copyright law. The educators', scholars' and librarians' points of view were regularly communicated to the Congressional committees as the bills progressed through the legislative process.

One of the principal concerns of the Ad Hoc Committee was the preservation of the limited right of educators and scholars to use copyrighted materials in the public interest in education. The constituency of the Ad Hoc Committee was satisfied to continue to operate under the authority of the fair use doctrine. The Committee, therefore, was pleased that Congress expressly wrote fair use into § 107 of the Copyright Act. The relevant portion of § 107 reads:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.(emphasis added)

Since the new act was passed, the representatives of copyright proprietors, in the publishing, music and audio-visual fields, have persistently sought to restrict the effect of the fair use provision. The Ad Hoc Committee and educational, library and scholarly groups have been constrained to maintain constant vigilance lest those efforts succeed in frustrating the intent of Congress and the needs of teaching and scholarship. The present case is potentially an example of those efforts.

The decision of the Ninth Circuit Court of Appeals, decided on October 19, 1981, and reported at 659 F.2d 963, was that off-the-air taping of copyrighted television programs for home use is an infringement of copyright, and that appropriate

remedies may be applied. The defendants in this case, however, are the makers and distributors of equipment that produces the copies. The Court of Appeals opirion states that, on remand, the district court "should reconsider" its determination "that an injunction against sale and distribution of equipment for off-air copying in the home would not be an appropriate remedy." 659 F.2d at 976. That proposition is extremely disturbing to the educators and librarians.

School teachers and university professors regularly use off-air copying equipment in order to record broadcast programs for display to pupils and students in classrooms. That is expressly allowed as fair use under § 107 of the Copyright Act.

Recording for classroom purposes, however, must on occasion be accomplished in homes in the evenings and on weekends when classes are not in session. If the defendants in the present case were enjoined from selling and distributing the necessary equipment, or were required to pay significant royalties for this fair use privilege granted to educators, the educational use of broadcast material would be seriously handicapped.

The teachers, scholars, and librarians are deeply concerned lest the fair use exception to copyright proprietors' exclusive rights be eroded by measures such as those sought by the plaintiffs in this case and apparently approved by the court below.

REASONS FOR GRANTING THE WRIT

In holding that home recording and use of taped copies of broadcasts of copyrighted material are not "fair use" under the Copyright Act, the court below was not simply interpreting a statute in a dispute among major commercial interests. The issue in this case, especially as treated in the opinion below, can affect press freedom, education, and the public's right to hear, see and know. Those rights are expressly within the purpose described in that part of the Constitution that forms the constitutional basis of the Copyright Act: "To promote the progress of science and useful arts ..." United States Const., art. I, § 8, cl. 8. The fair use exception, as judicially created and confirmed in

the Act at 17 U.S.C.A. § 107, is a reconciliation of free speech protection of the First Amendment with the copyright protection authorized by that introductory phrase of clause 8. "... [T]he doctrine of fair use ... has been precisely contoured by the courts to assure simultaneously the public's access to knowledge of general import and the right of an author to protection of his intellectual creation." H.C. Wainwright & Co. v. Wall St. Transcript Corp., 418 F. Supp. 620, 624 (S.D.N.Y. 1976). See also Keep Thompson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (D. New Hampshire 1978); 1 Nimmer on Copyright, Section 1.10[D] at 1-91 (1981).

The public interest is often best served by the parties to a dispute

resolving their differences by negotiation rather than litigation. The decision below, unfortunately, could very well undermine the set of guidelines on the use of off-air taping for classroom use negotiated under the auspices of the House Judiciary Committee. Those guidelines were signed by the following:

- Avco Embassy Pictures Corp.
- Columbia Pictures Industries, Inc.
- Filmways Pictures, Inc.
- Metro-Goldwyn-Mayer Film Corp.
- Twentieth Century-Fox Film Corp.
- Universal Pictures, a division of Universal City Studios, Inc.
- Agency for Instructional Television
- CBS
- Association of Media Producers

- Motion Picture Association of America
- American Library Association
- National Education Association
- Association for Educational Communications and Technology
- Authors League of America
- Screen Actors Guild
- Joint Council on Educational Communications
- Directors Guild of America
- Association of American Publishers
- National Association of Broadcasters
- ABC
- Public Broadcasting Service
- American Council on Education
- National School Boards Association
- Writers Guild of America, East
- American Federation of Television and Radio Artists

127 Cong. Rec. E4731 (daily ed. Oct. 14, 1981).

Unlike the users of copyrighted material addressed by the complaint in this case, the constituency represented by the Amicus Ad Hoc Committee, consisting of professors, teachers and librarians, does not make copies of broadcasts "for home use." Their concern is with copying for teaching, including classroom use, which is specifically defined as "fair use" in § 107. The availability of copying equipment, such as that made and sold by the defendants in this case, is essential for that purpose.

The opinion below, however, stated that the "district court ... should reconsider its action" in determining

"that an injunction would not be an appropriate remedy." 659 F.2d at 976. The court concluded that "the result of applying fair use to intrinsic use cases ... is a fundamental restructuring of the copyright system not justified by the statutory scheme or traditional notions of fair use." 659 F.2d at 971. The opinion errs in this description of the fair use rule, as indicated in Part II of this brief. Even if the opinion below should be held to state the law correctly as to home use, however, the suggestion of an undiscriminating injunction against sale and distribution of the Betamax and similar recording devices is wholly improper.

The opinion below may well have violated this Court's own admonishment.

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.(footnotes omitted) Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

I.

AN INJUNCTION AGAINST SALE WOULD PREVENT ALL FAIR USE OF OFF-AIR RECORDINGS

The injunction sought by the plaintiffs and sanctioned by the Court below would deprive educators at all levels of the opportunity to record material needed for effective teaching. As previously set forth in the statement of interests of amicus curiae, teachers regularly use off-air copying equipment in order to record

broadcast programs for display to pupils and students in classrooms. That is expressly allowed as fair use under § 107 of the Copyright Act. Recording for classroom purposes, however, must on occasion be accomplished in homes in the evening and on weekends when classes are not in session. If the defendants in the present case were enjoined from selling and distributing the necessary equipment, or were required to pay significant royalties for this fair use privilege granted to educators, the educational use of broadcast material would be seriously handicapped.

The Court is fully aware of the number of pupils and students in schools and colleges throughout the country. The educational opportuni-

ties of all of them would be affected adversely by denial of access to one of the most important technological developments of recent years. A decision that copying for educational purposes may not be done on videotape recorders could also affect the similar use of other technologies in education, such as photocopying machines, word processors, satellite transmission and telecopying.

The remedy suggested by the court below would threaten to make all of this kind of activity practically impossible. Whether or not the court correctly interpreted the fair use provisions of the Act as applied to home use, the remedy of preventing other, legitimate uses of the recording equipment is equivalent to throwing out the baby with the bath

water. It is far more protection of the interests of copyright proprietors than is necessary or justified. The need for correction of that part of the decision below on a question of federal law of nationwide importance warrants granting of the petition for writ of certiorari.

II.
RECORDING OFF-AIR FOR EDUCATION IS FAIR USE

In deciding that recording off the air for home use is an infringement of copyright, the court below indicated approval of the position expressed by Leon Seltzer in his book, Exemptions and Fair Use in Copyright, 24 (1978), that the statutory definition of "fair use" refers to use "by a second author of a first author's work," and does not cover "mere reproduction of a work in order to use it for its intrinsic purpose -to make what might be called

"ordinary" use of it. 659 F.2d at 970. The Act, however, states expressly that copying for "teaching (including multiple copies for classroom use)" is fair use. 17 U.S.C.A. § 107. No citation of authority is needed to defend a position so clearly supported by statute. There are, however, no cases to the contrary.

Using a broadcast work for teaching is clearly placing it in "ordinary" use for its "intrinsic purpose," that is, to be seen and heard by viewers. When the viewers of the copy are students in a classroom, the use of the copy is, by the express statutory definition, "fair." The nature of the use determines the fairness; there is no infringement if the copy is used as the Act permits.

In addition to the "fair use" exception defined in the statute, classroom use may also be made of copies of broadcast material for which no copyright protection is authorized. Works in the public domain, either by expiration of copyright or original ineligibility, have no copyright monopoly. Materials emanating from government sources cannot be the subject of copyright. Copyrighted material covered by a valid license to copy are often used in classrooms. Photographs that are "news" may not be withheld from public viewing by a claim of copyright. Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968). All of these materials would become inaccessible for classroom teaching if the injunction proposed by the court below were imposed.

A prohibition against any copying of televised broadcasts, such as the injunction sought by the plaintiffs and sanctioned by the court below, would be an unwarranted interference with the rights of teachers, school systems and college and university professors under the Act. Even if the court below, while dealing with "home use" of copies, did not intend to impose the same kind of obstacle in the non-profit educational context, the decision below obviously sanctions it. This Court is urged to correct that error.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Michael H. Cardozo
Counsel of Record

Suite 1004
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 872-1401

August W. Steinhilber
Co-Counsel

Suite 600
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 337-7666

Attorneys for Amicus Curiae
Ad Hoc Committee on Copyright Law

APPENDIX

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

Agency for Instructional Television

American Association of Law Libraries

American Association of School Administrators

American Association of University Women

American Council on Education

American Educational Theatre Association, Inc.

American Library Association

Association for Childhood Education International

Association for Educational Communications and Technology

Association of American Law Schools

Association of Research Libraries

Corporation for Public Broadcasting

Council for American Private Education

Council for Chief State School Officers

Independent Colleges Office

International Reading Association

Joint Council on Educational Telecommunications, Inc.

Modern Language Association

Music Educators National Conference

National Association of Independent Colleges and Universities

National Association of Schools of Music

National Clearinghouse for Bilingual Education

National Commission on Libraries and Information Science

National Council of Teachers of English

National Education Association

National Public Radio

National School Boards Association

Public Broadcasting Service

Speech Communication Association

Uniformed Services University of the Health Sciences

Amicus Brief

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No. 81-1687

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, ET AL.,

Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. AND WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF AMICUS CURIAE OF THE AMERICAN LIBRARY ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

NEWTON N. MINOW*
MARY M. HUTCHINGS
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000
Attorneys for Amicus Curiae,
American Library Association

*Counsel of Record

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN LIBRARY ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

INTEREST OF AMICUS CURIAE

The American Library Association ("ALA"), by its attorneys, respectfully files this brief Amicus Curiae in support of Sony Corporation of America's ("Sony") Petition for a Writ of Certiorari.*

The ALA is the world's oldest and largest library association. Its 39,000 members include libraries, librarians, library trustees and friends and patrons of libraries, repre-

* Consent of the parties has been granted. Copies thereof are on file with the Court.

senting a wide spectrum of users of copyrighted materials. A principal mission of the ALA and of libraries is to insure that all in our society have access to information under terms that are fair both to copyright owners and copyright users. For this reason, ALA has been in the forefront of copyright law revision throughout its history and was one of the major consultants to the architects of the Copyright Revision Act of 1976.*

The Ninth Circuit's decision in this case has major implications for libraries and librarians and for the public's right of access to information and entertainment.

First, the Court's holding below that "intrinsic" uses of copyrighted materials cannot be "fair" uses will profoundly affect the ability of librarians to serve their constituencies effectively. Libraries are the critical link in bringing new information technologies to the public at large. Libraries permit the masses to use such technologies otherwise available only to the rich. Thus, many libraries now, and in the future most libraries will, provide patrons with access to videorecorders for "in-library" use. An increasing number of libraries provide off-air tapes of news and other programs for in-library viewing for patrons who are unable to afford their own recorders, and who otherwise would be denied access to broadcast programming. If the decision of the Court of Appeals is not reversed, libraries could be accused of making, or of aiding and abetting, unfair "intrinsic" uses of copyrighted materials. Rapid technological change and the need to strike a reasonable balance between the interests of copyright owners and copyright users make an early national resolution of these issues a matter of great urgency.

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* The Association has worked with coalitions of publishers, other copyright owners and copyright users in general to establish voluntary guidelines governing the photocopying of library materials for classroom use and the educational use of off-the-air tapes.

Secondly, the Ninth Circuit's holding that "intrinsic" uses of copyrighted materials must be justified by a countervailing social benefit such as the tremendous value of medical research by which the Ninth Circuit distinguished *Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376, 43 L. Ed.2d 264, 95 S. Ct. 1344 (1975) will seriously affect public access to information and severely constrict the traditional roles of libraries. For example, libraries photocopy articles from journals for patrons when there would not be significant market impact. However, a library could neither predict or know with any degree of certainty whether reproduction of an article for a patron was of sufficient social benefit to satisfy the Court of Appeals' test. A library cannot inquire as to the patron's need and planned use for the requested material, nor can it judge the educational or scientific value of the patron's request without violating long-established ethics of librarianship.

The effect of the Court of Appeals' holding is to create a dichotomy between entertainment and education which will restrict public access to information and constrict the judicially-recognized role of libraries as "a mighty resource in the free market place of ideas." *Minarcini* v. *Strongville City School District*, 541 F.2d 577, 582 (6th Cir. 1976).

Finally, the Ninth Circuit's construction of § 108 of the Copyright Revision Act of 1976, 17 U.S.C. § 101 et seq., threatens the fair use rights of libraries and librarians. The Ninth Circuit stated that Section 108 clearly established that Congress did not intend to create a blanket home video recording exemption. However, Section 108 was designed only to grant certain rights to libraries over and above those available under fair use, Section 107, and does not address home recording. The Ninth Circuit's implication that a library's reproduction rights are limited to those

available under Section 108 is contrary to the manifest intent of Congress and should be corrected.

In sum, the issues raised by this case are of great national importance to libraries, librarians and users of libraries. For this reason, and because the ALA believes its analysis of those issues may assist this Court in resolving them, ALA respectfully submits this brief as Amicus Curiae.

ARGUMENT

Summary of Argument

The Ninth Circuit held that only "productive" uses of copyrighted materials could be fair uses under the Copyright Revision Act of 1976, 17 U.S.C. § 101 et seq. This holding is erroneous and in clear conflict with the decision of the Court of Claims in *Williams & Wilkins Co.* v. *U.S.*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376, 43 L.Ed.2d 264, 95 S.Ct. 1344 (1975). The resolution of this conflict and of the questions concerning fair use decided by the Ninth Circuit possesses enormous national importance, particularly for librarians and library users, since the Ninth Circuit's wooden interpretation of the Copyright Act will seriously affect the ability of librarians to serve their patrons and will restrict the public's access to information. In addition, the Ninth Circuit's decision will deprive the copyright law of its flexibility to adapt to new technologies. Rapid technological changes in the information industry and the need to strike a workable, reasonable balance between the interests of copyright owners and copyright users make an early national resolution of these issues a matter of even greater urgency.

Finally, the Ninth Circuit's holding that Section 108 of the Act establishes the Congress' intent not to recreate a blanket home recording right threatens to deprive libraries of their fair use rights and further undermines their ability to adequately serve their patrons.

I. THE HOLDING OF THE NINTH CIRCUIT COURT OF APPEALS THAT ONLY "PRODUCTIVE" USES OF COPYRIGHTED MATERIALS CAN BE "FAIR USES" UNDER SECTION 107 OF THE ACT IS IN ERROR AND IN CONFLICT WITH THE DECISION OF THE COURT OF CLAIMS IN WILLIAMS & WILKINS CO. V. U. S.

The Court of Appeals held that "intrinsic" uses of copyrighted materials cannot be "fair" uses. That holding is in

error and in direct conflict with the court's decision in *Williams & Wilkins Co.* v. *United States,* 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court,* 420 U.S. 376, 43 L. Ed.2d 264, 95 S.Ct. 1344 (1975).* There the Court of Claims upheld the applicability of the fair use doctrine to "intrinsic" uses of copyrighted materials. The Ninth Circuit's decision is in obvious conflict with that decision because it holds that an "intrinsic" use cannot be "fair."

The Ninth Circuit's holding that fair use must involve "the use by a second author of a first author's work" further conflicts with the clear intent of Congress in Section 107 of the Act to establish a flexible fair use doctrine that can be readily adapted to new technologies, not a wooden principle frozen to the technologies available before 1976. See, H. Rep. 94-1476, 94th Cong. 2d Sess. (1976), p. 66. The legislative history clearly reveals the Congressional intent "to restate the present judicial doctrine of fair use, not to change, *narrow,* or enlarge it in any way." H. Rep. No. 94-1476, 94th Cong. 2d Sess. (1976), p. 66 (emphasis added). *Williams & Wilkins* held in 1975 that certain intrinsic uses of copyrighted materials by the National Library of Medicine were fair.** The Ninth Circuit's holding that intrinsic uses cannot be fair *narrows* the application of the doctrine and thus conflicts with the Congressional intent of the statute.

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* *Williams & Wilkins Co.* dealt with issues now primarily addressed by Section 108 of the law, and upheld certain institutional photocopying practices.

** In addition, the Register's 1961 Report, cited in the legislative history of Section 107, recognizes some intrinsic uses as fair uses—reproduction of a part of a work to illustrate a lesson; reproduction by a library of a portion of a work to replace a damaged copy. *See* H. Rep. No. 94-1476, 94th Cong. 2d Sess. (1976), p. 65.

The Ninth Circuit further held that in any event *Williams & Wilkins* could be distinguished because of the countervailing social benefit of the uses of copyrighted materials in that case and the disastrous social consequences of reduced access to the scientific materials there in issue. This holding will seriously inhibit public access to all kinds of information through libraries. Libraries cannot know in advance whether any patron's use of copyrighted materials will be of sufficient social benefit to meet the Ninth Circuit's stringent test and yet if a use fails that test, libraries and librarians could be contributory infringers under the Ninth Circuit's decision. The kinds of materials typically photocopied by libraries or otherwise reproduced for patrons are often for scholarly and research purposes, but there are in practice no lines between information and entertainment as clear as the Court of Appeals is able to discern for purposes of its analysis of this case. The "ordinary" purpose of a television program may be to entertain or to inform—in either case it may well serve to educate; to generate thought, criticism, comment and scholarship, and to provide the basis and background against which critical thought may take place. Librarians, as the storekeepers of knowledge in all its tangible forms, cannot agree with the Court of Appeals' broad cavalier judgment that:

> "the consequences attendant upon reduced consumer control of access do not in any way correspond to the deleterious consequences of reduced access identified by the Court of Claims in *Williams & Wilkins Co.*"
>
> *Universal City Studios, Inc.* v. *Sony Corporation of America*, 659 F.2d 963, 971 (9th Cir. 1981).

The ALA believes that the purposes of the original broadcasts here in issue and of home videorecordings are not the same. The purpose of the first is the *commercial* dis-

tribution of the programming; the second is the non-profit, *non-commercial*, private use of that same programming. The Court of Appeals has treated home recording as if it were done for the purpose of commercial gain or advantage, and in so doing has established the fair use doctrine as a censor of the kinds of private, non-commercial uses for which an individual or a library may use copyrighted material. It has confused commercial, systematic, multiple copy reproduction with *ad hoc private, non-commercial* activity and has established a distinction between uses not previously found in the fair use doctrine. Because this confusion will seriously affect libraries' and patrons' rights of access to information, this Court must resolve the important issues regarding fair use presented by this case.

II. THE NINTH CIRCUIT'S DECISION HAS CREATED DOCTRINAL CONFUSION CONCERNING WHETHER FAIR USE RIGHTS OF LIBRARIES ARE IN ADDITION TO SPECIAL LIBRARY RIGHTS UNDER SECTION 108, AND THIS COURT SHOULD CORRECT THIS ERROR BECAUSE THE PUBLIC'S RIGHT OF ACCESS TO COPYRIGHTED MATERIALS DEPENDS ON LIBRARY REPRODUCTION UNDER BOTH SECTIONS 107 (FAIR USE) AND 108.

The Ninth Circuit's holding that Section 108 establishes that Congress did not intend to create a home recording exemption is also of major concern to librarians, libraries, and library patrons because it seriously misconstrues the intent of Section 108. The Ninth Circuit referred to the limitation in Section 108 that requires libraries to distribute taped audiovisual material only by lending and concluded "In light of this caution with respect to the limited § 108 exemption, it is clear that Congress did not intend to create a blanket exemption for home video-

recording. . . ." *Id.* at 967. This conclusion overlooks the fact that Section 108 grants to libraries and archives open to the public certain rights *in addition* to those granted under fair use, (Section 107) and was not intended to address private, in-home videotaping. The decision below, if it is allowed to stand, is likely to be construed as a definition of *all* of a library's reproduction rights, when in fact 108 was meant to allow libraries to engage in certain additional activities, such as inter-library loan arrangements, which may not otherwise be deemed fair use. The Act specifically states:

> "(f) Nothing in this section (4) in any way affects the right of fair use as provided by Section 107 . . ."

17 U.S.C. 108(f)(4).

The House report explains:

> "Nothing in Section 108 impairs the applicability of the fair use doctrine to *a wide variety* of situations involving photocopying *or other reproduction* by a library of copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes." (emphasis added)

House Report 94-1476, 94th Cong. 2d Sess. p. 78 (1976).

Thus, Section 108 explicitly recognizes that libraries may have additional fair use rights to reproduce copyrighted works—in print and in tape form—for patrons. The House Report specifically notes that although Section 108(h) generally removes musical, graphic, sculptural, motion pictures and non-news audiovisual works from the library reproduction exemption,

> "it is important to recognize that the doctrine of fair use under Section 107 remains *fully applicable* to the photocopying *or other reproduction* of such works."

Id. at 78.

The public relies on libraries as its primary source of many kinds of information. Economic conditions have placed a great strain on library services, and inter-library loans, networks, photocopying and other forms of resource sharing have allowed libraries to maintain high levels of public service. It is thus vital to the public interest that libraries utilize both Sections 107 and 108 of the Act in fulfilling requests for information and service and that the Ninth Circuit's decision not undermine this access by its misinterpretation of Section 108.

CONCLUSION

National questions of major public importance are presented here. The Ninth Circuit's decision conflicts with the intent of Congress in enacting § 107 of the Copyright Revision Act of 1976 and with the decision of the Court of Claims with respect to the availability of the fair use defense for "intrinsic" uses of copyrighted materials. Also at stake is the nature of libraries' rights under Sections 107 and 108 of the Copyright Revision Act of 1976. A speedy resolution of both issues is needed to protect the public's right of access to information and the vital role of libraries in providing that access. Therefore, the American Library Association respectfully urges this Court to grant the Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

NEWTON N. MINOW*
MARY M. HUTCHINGS
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000
Attorneys for Amicus Curiae, American Library Association

Of Counsel
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

*Counsel of Record

Amicus Brief

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IN THE
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OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, *et al.*,
Petitioners,
v.
UNIVERSAL CITY STUDIOS, INC., AND
WALT DISNEY PRODUCTIONS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF CBS INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUIS R. COHEN *
JOEL ROSENBLOOM
DUANE D. MORSE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Amicus Curiae CBS Inc.

Of Counsel:
GEORGE VRADENBURG III
HARRY R. OLSSON, JR.
CBS INC.
51 West 52 Street
New York, New York 10019

May 10, 1982

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF AMICUS CURIAE OF CBS INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CBS Inc. ("CBS")[1] respectfully submits this brief *amicus curiae* in opposition to the Petition for a Writ of Certiorari.[2]

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[1] CBS Inc. has no parent companies, subsidiaries (except wholly owned subsidiaries), or affiliates. (We construe the terms "parent companies," "subsidiaries" and "affiliates" to mean corporations whose shares are publicly traded and which, in the case of "parent companies," own a majority of the shares of a party; or, in the case of "subsidiaries and affiliates," a majority of whose shares are owned by a party.)

[2] The consents of the parties are on file with the Clerk.

INTEREST OF AMICUS CURIAE

CBS is engaged in several activities that may be affected by this litigation. CBS produces television programs, theatrical feature films, and other audiovisual works. The CBS Television Network distributes such works for broadcast by five CBS-owned television stations and approximately 200 affiliated stations;[3] CBS also distributes such works to cable systems and markets them on videodiscs and videocassettes for home viewing.[4] Many of the works that CBS distributes are supplied by independent producers. Nearly all of the works it produces or distributes are copyrighted.

CBS's interest as a distributor of prerecorded videocassettes would, in the short run, be served if petitioners should prevail in this case. The marketing of prerecorded videocassettes depends upon the purchase by the public of videocassette recorder-players such as those here at issue. The primary use for which such equipment is now being sold to the public is home reproduction of copyrighted works broadcast by television stations. Any restriction on the home use of such equipment or increase in its price would work against the short-run interest of CBS in maximizing the number of videocassette recorders in use.

The interests of CBS as a broadcaster look in the opposite direction. If the broadcasting of copyrighted material creates a right to make home copies without compensation to the copyright owner, the price CBS pays for the right to broadcast will tend to go up. And because, for a variety of reasons, videotape viewers are less valuable to advertisers than are off-the-air viewers, the higher cost of licensing these works will not be com-

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[3] The five CBS-owned stations also broadcast substantial amounts of non-network programming.

[4] In addition, CBS is a major manufacturer of phonograph records and audio tapes.

pensated by revenues from any increased viewing that home taping might permit.

In the long run, the primary interest of CBS in all the noted fields is to ensure that the copyright system continues to provide adequate compensation to copyright owners for the use of their works. CBS depends on the continuing creative efforts of America's authors, playwrights, screenwriters, composers, performing artists, and other creators of "intellectual property." By giving an author (or his assignee) the exclusive right to "reproduce" a creative work and hence the right to charge others for reproduction rights, the copyright system provides the economic incentive for those efforts. If the intended audience for a creative work is free to make home copies without direct or indirect payment to the copyright owner, the economic incentive for creative activity inherent in the copyright system will be eroded.

SUMMARY OF ARGUMENT

This case does not, at this stage, warrant the exercise of the Court's discretionary review power. The court of appeals' decision that home video taping of a copyrighted television program is an infringement of copyright and that petitioners are liable as contributory infringers follows directly from clear statutory language and settled legal principles. Nor does the court's decision create any conflict between federal courts on any issue. While this case may well present novel and interesting questions concerning the scope and nature of relief, those questions are not now before the court and, in light of pending legislative proposals, may never be. Accordingly, the Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. The Court of Appeals' Holding on the Issue of Liability for Copyright Infringement Is Plainly Correct

The decisions below[5] involved essentially three questions: Is the right to make or authorize home recordings of copyrighted works one of the rights granted by statute exclusively to the copyright owner? If so, does such recording constitute a fair use which is, therefore, not an infringement of copyright? If such recording is an infringement of copyright, are manufacturers and sellers of machines and tapes used to make those recordings liable as direct or contributory infringers?

The court of appeals' answer—that home recording of copyrighted works is an infringement of copyright for which petitioners are contributorily liable—was plainly correct: As the very term "copyright" implies, the right to reproduce a creative work is the oldest and most basic of the rights that have been granted to copyright owners. There is no question that the right to make home recordings is one of the exclusive rights conferred by § 106 of the Copyright Act.[6] Indeed, petitioners have now apparently abandoned any contention that Congress, without

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[5] *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429 (C.D. Cal. 1979), *rev'd in part and aff'd in part*, 659 F.2d 963 (9th Cir. 1981).

[6] Among the district court's reasons for holding home taping of copyrighted works not to be an infringement was the fact that copyright owners "voluntarily choose to have [their works] telecast over public airwaves to individual homes free of charge." 480 F. Supp. at 453. But the mere broadcast performance of a work no more justifies its unlicensed reproduction than would a stage performance. In *Walt Disney Prods. v. Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969), the court held squarely that the broadcast performance of a work did not justify either the making of a videotape by a cable system operator or the work's later retransmission through the cable system.

saying so, created a statutory exemption for home taping.[7]

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[7] Relying on the legislative history of the Sound Recording Amendment of 1971, the district court had found in the 1976 Act an unstated exemption for home copying of audio materials, which it then extended to audiovisual materials. The court of appeals disagreed and petitioners now concede that, "under the 1976 Act, exceptions or limitations as to the § 106 'exclusive rights' are codified, including 'fair use' in general (§ 107) and various express usages in particular (§§ 108-118)." Pet. at 14. None of those sections purports to create a special exemption for home recording.

Although this case does not involve audio materials and the implied-exemption argument on which the district court relied has been abandoned, it should be noted that the district court's premise was wrong: there is no unstated exemption for home copying of audio materials.

The Copyright Act of 1909 protected composers (and their assignees) against unauthorized mechanical reproduction of musical works. The Sound Recording Amendment of 1971 created an additional copyright protecting performing artists, record companies, and others against unauthorized reproduction of a particular recorded *rendition* of a musical work. Unauthorized copying violates both copyrights.

After the 1971 Act had passed the Senate, language appeared in the House Report that the district court read as creating an unstated exemption for home copying. But as noted by Professor Nimmer in a passage from his treatise quoted by the court of appeals, 659 F.2d at 968, n.5, these remarks, never joined in by the Senate, contain no hint of an intention to amend the composer's copyright that had existed since 1909 and do not purport to carve out any special exemption from the sound recording (rendition) copyright.

The 1976 Act preserved both the musical copyright and the sound recording copyright. There is no suggestion in the legislative history of the 1976 Act of any exemption for home taping. To the contrary, the 1976 Act was "not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5679. *See generally* 3 *Nimmer on Copyright* § 13.05 [F][5], at 13-95-96 n.159 (1981). Moreover, the 1976 Act protects in separate subsections the copyright owner's exclusive right to "reproduce" the work, § 106(1),

Nor is there any real doubt that the manufacturers and sellers in this case—who designed, manufactured, advertised and sold the Betamax primarily to record copyrighted programs off-the-air, 659 F.2d at 975, and who made no effort to discourage or prevent that use, 480 F. Supp. at 436, 462—fit the black-letter definition of a contributory infringer accepted by both lower courts in this case: "one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another. . . ." [8] The district court's answer was that the machine is a "staple item of commerce," but since the infringing uses of the Betamax plainly predominate, that exception does not apply.

The court of appeals correctly ruled that a finding of fair use under the circumstances of this case would "*stretch*[] *fair use beyond recognition*. . . ." 659 F.2d at 970 (emphasis in original). As the Second Circuit has said, the doctrine of fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." [9] Implicit in the concept of fair use, then, is the requirement that the use of the work be incidental to some distinct, productive purpose. Nimmer has termed this requirement the "functional test": if the defendant's use performs the same function as the copyrighted work—if it supplants the use of the copyrighted work by that work's intended audience—the use is not fair. 3 *Nimmer on Copyright* § 13.05[B], at 13-

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and his right "to distribute copies or phonorecords," § 106(3), making it clear that unauthorized reproduction is infringement even if there is no distribution.

[8] *Gershwin Publishing Corp. v. Columbia Artists' Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971), *quoted below*, 659 F.2d at 975; 480 F. Supp. at 459.

[9] *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

62-64 (1981).[10] The statutory examples of fair use Congress provided in § 107 of the 1976 Act—"reproduction . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research"—reflect the categories of uses Congress considered "fair." [11]

The use involved in this case—home videotaping of creative works in their entirety solely for the convenience and enjoyment of the VCR owner—lacks the fundamental, productive character of a fair use. It is copying that directly supplants the copyrighted work in meeting the viewing needs of that work's intended audience, thereby reducing the value of the work for future broadcast or other uses. In short, it is simply infringement.[12]

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[10] The Senate Committee on the Judiciary echoed this view in its 1975 Report on the proposed revision of the Copyright Act: "With certain special exceptions (use in parodies or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975).

[11] The 1975 Senate Report suggests that Congress did not consider home taping to be fair use. Noting that schools located in time zones several hours removed from the point of origin of educational television transmissions might need to record that programming for delayed presentation to students, the Committee stated that it believed such recording to be a fair use. But the Committee was careful to point out that it "[did] not intend to suggest, however, that off-the-air recording for convenience would under any circumstances, be considered 'fair use'." *Id.* at 66.

[12] Petitioners rely heavily on the statements in the legislative history of the 1971 Sound Recording Amendment discussed above at note 7 to argue that Congress in 1976 must have intended home recording to be treated as a fair use. *See* Pet. at 14-16. But these remarks about the state of the judicially developed doctrine of fair use are not controlling. Indeed, as already shown, *supra* note 11, the Senate Committee in 1975 expressed the contrary view that home recording does not constitute fair use. The important point is that both houses made it plain that the 1976 Act was intended to codify the existing judicial doctrine of fair use, neither en-

The only case that petitioners have cited in support of their contrary argument is *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975). But *Williams & Wilkins* involved copying by the National Institute of Health and the National Library of Medicine of isolated articles from medical and scientific journals to fill single requests of library patrons, generally scientists and physicians. The Court of Claims found this to be a fair use, in part because it was "convinced that medicine and medical research will be injured by holding these particular uses to be an infringement." [13] 487 F.2d at 1354. No comparable scholarly use is involved in this case. Furthermore, the *Williams & Wilkins* problem apparently has been resolved legislatively by §§ 108(a) and (d) of the 1976 Act, which provide that, in most situations, it is not an infringement of copyright for a library to reproduce no more than one copy of a journal article if the copy becomes the property of the requesting patron and the work is to be used for private study, scholarship or research. This fact suggests Congress was skeptical that the use at issue in *Williams & Wilkins* was a fair use. At any rate, the case creates no live conflict and is not authority for the proposition that home video recording of copyrighted creative works for convenience and entertainment purposes is a fair use.

In sum, the liability of petitioners is clear. Their contrary argument is, at best, an attempt on policy grounds to carve an exception out of a statute that does

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larging nor narrowing it. *See* H.R. Rep. No. 1476, 96th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5680; S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975). Thus, the fair use question in this case must be resolved according to settled principles of fair use case law.

[13] It should be noted that § 107 of the 1976 Act lists reproduction for "scholarship" and "research" as examples of fair use.

not contain one. But where an activity is clearly an infringement under the Copyright Act, as it is in this case, the courts should apply that statute as written. As the Court said in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S 390 (1968), a case involving the question whether retransmission of copyrighted television programming by a cable television system was an infringing "performance" under the 1909 Act:

> "We have been invited by the Solicitor General in an *amicus curiae* brief to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy. We decline the invitation. That job is for Congress. We take the Copyright Act of 1909 as we find it." *Id.* at 401-02 (footnotes omitted).

II. The Remaining Issues Petitioners Seek To Raise Are Not Ripe for Review

The novel and interesting question about unauthorized home taping of copyrighted works is not whether the practice is an infringement, but what to do about the fact that it obviously is. It is neither desirable nor practical to prohibit or meter taping done in private homes, yet the copyright owner is entitled to appropriate compensation for the use of his property. It is this conflict between the right to privacy and the right to compensation that has attracted the attention of the press and public. The relief issue, however, is not ripe for review, and the Court should follow its customary practice and decline to consider that issue at this point in the litigation.

The lower courts have not yet examined the complex question of relief in light of the holding of liability. The court of appeals remanded without limiting the district court's discretion as to remedy but with the strong suggestion that it consider imposing a "continuing roy-

alty." [14] In proceedings on remand, the parties and the lower courts could consider such questions as how to measure the economic value of the right to tape copyrighted works, how to measure the economic harm to copyright owners when such taping occurs, and how to measure the contribution made to such infringing activity by defendants' machines and tapes. The Court should give the lower courts and the parties an opportunity to examine these real and substantial questions and the courts an opportunity to fashion appropriate relief.[15]

Denying the writ at this stage seems particularly appropriate in the present case since, as petitioners acknowledge, "the Court of Appeals' decision prompted instant Congressional action" in the form of proposals designed to accomodate the various interests at stake in this litigation. Pet. at 13. *See* Amendment No. 1333 to S. 1758, which is sponsored by more than 15 Senators, and H.R. 5705, which is sponsored by 60 members of the House.[16] If either of those proposals is adopted, the problem of how to fashion relief in cases of this sort would be resolved.

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[14] The court of appeals also made clear that concern for intrusion on the privacy of VCR owners was a fully appropriate consideration at the relief stage. 659 F.2d at 972.

[15] Petitioners' claim that no compulsory licensing and royalty arrangement could be worked out within the existing statutory framework is likewise premature. On the present state of the record there is no reason to believe it infeasible to develop a private market-clearing mechanism, perhaps relying on statistical sampling of home use as a basis for allocating royalties. Copyright owners have obvious incentives to develop such a mechanism.

[16] The Senate Committee on the Judiciary is actively considering these proposals. Hearings were held on November 30, 1981 and again on April 21, 1982, and Committee action may be taken within the next several weeks. The Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary held hearings on April 12, 13 and 14, 1982, and plans one further day of hearings in the near future.

A remedy, whether judicial or legislative, that balances the various goals in some such fashion makes eminent sense. The essence of copyright is to encourage creativity by giving authors a property right, so that they may obtain royalties from those who wish to make copies. The system works well when copying can be monitored, but technology has now made possible the making of copies in private homes, without yet making precise monitoring of home use both practical and unintrusive. There is no reason why continuing changes in technology should result in a denial of the rights plainly granted and the compensation that Congress plainly intended the copyright owner to have. What is needed is the development of means to assure that reward under the conditions that technology has created. We repeat, however, that the question of how such a means may lawfully be developed is not now, and may never be, before the Court.

CONCLUSION

For the foregoing reasons, CBS respectfully urges this Court to deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

LOUIS R. COHEN *
JOEL ROSENBLOOM
DUANE D. MORSE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Amicus Curiae CBS Inc.

Of Counsel:
GEORGE VRADENBURG III
HARRY R. OLSSON, JR.
CBS INC.
51 West 52 Street
New York, New York 10019

May 10, 1982

* Counsel of Record

Amicus Brief

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IN THE

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, et al.,
Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,
Respondents.

BRIEF OF CES PUBLISHING CORP., AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETER F. MARVIN
(Counsel of Record)
CHRISTIAN H. MILLER
MILLER SCHREIBER & SLOAN
1529 Walnut Street
Philadelphia, PA 19102
(215) 567-4900

Attorneys for CES Publishing Corp., Amicus Curiae

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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This Brief Is Submitted With the Written Consent of All Parties on File With the Clerk of This Court.

INTRODUCTION

Sony Corporation of America *et al.* have petitioned this Court for a writ of certiorari to secure review of a decision of the United States Court of Appeals for the Ninth Circuit. That decision, reported at 659 F. 2d 963 (9th Cir. 1981), reversed an order of the United States District Court for the Central District of California. The District Court's opinion, reported at 480 F. Supp. 429 (C. D. Cal. 1979), held in favor of Sony. The reversal by the Court of Appeals was predicated principally on the ground that home use of videotape recorders ("VTRs") for private, noncommercial purposes did not and could not constitute a "fair use" of copyrighted materials within the meaning of 17 U. S. C. § 107 (1976).

CES Publishing Corp. publishes the monthly trade magazine *Consumer Electronics,* which reports on developments in the home electronics industry. *Consumer Electronics* consists principally of articles regarding new technological developments. A major portion of its income is derived from the sale of advertising space in the magazine to manufacturers and distributors of home electronic products employing new technology. The Court of Appeals' decision that home use of videotape recorders does not constitute a "fair use" poses a serious threat to the continuing development of technologically new products which traditionally had received a substantial measure of protection under the fair use doctrine. Such threat to new technology and the real possibility that such a threat will reduce technological advances in home electronic products present substantial danger to the continuing vitality of *Consumer Electronics.* These threats are among the ramifications of the decision of the Court of Appeals. They comprise the emphasis of this amicus curiae brief in support of Sony's petition to this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Holding of the Court Below That "Intrinsic Use" Cannot Constitute "Fair Use" Conflicts With a Decision of the Court of Claims.

In addressing whether the use in the home of videotape recorders for the recording of publicly broadcast television programs constitutes a "fair use" of copyrighted programs within the meaning of 17 U. S. C. § 107 (1976), the Court of Appeals for the Ninth Circuit emphasized that such recording is for the purpose of "intrinsic," rather than "productive" use. The use at issue is deemed "intrinsic," in that programs recorded by the VTR perform the same function as that provided by the original broadcasted copies: VTR copies, like the originals, enable private program viewing for the purpose of education or entertainment.

The court below, in response to the challenge of determining the correct application of the fair use doctrine in the context of a new technological frontier, enunciated the startling proposition that "intrinsic use" cannot constitute "fair use": "Without a 'productive use', *i.e.*, when copyrighted material is reproduced for its intrinsic use, the . . . copying of the sort involved in this case precludes an application of fair use." *Universal City Studios, Inc. v. Sony Corporation of America*, 659 F. 2d 963, 971-72 (9th Cir. 1981).

As will be urged in greater detail in Part II, *infra*, the proposition that intrinsic use and fair use are mutually exclusive immediately works an unwarranted and inappropriate narrowing of the fair use doctrine. This Court should prevent any such erosion of the fair use doctrine by granting Sony's petition for certiorari.

In addition, a conflict exists between the decision below and that of the United States Court of Claims in *Williams & Wilkins Co. v. United States*, 487 F. 2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U. S. 376 (1975). In *Williams*, the Court of Claims held that

the reproduction of the full text of medical articles, a use that would be deemed "intrinsic" under the Ninth Circuit formulation, did constitute a fair use under the doctrine now codified at 17 U. S. C. § 107 (1976). The combined force of the conflict between *Williams* and the decision below, the certainty that lower courts will recurringly confront the important, general question of whether intrinsic and fair use are analytically compatible, and the strong federal policy of achieving uniformity in the application of federal law, militates strongly in favor of granting Sony's petition for certiorari.

II. The Holding of the Court Below That "Intrinsic Use" Cannot Constitute "Fair Use" Unjustifiably Constricts the Well-Established Scope of the Fair Use Doctrine.

A. This Court Should Consider Now the Degree to Which the Decision Below Conflicts With Clear Legislative Intent Regarding the Proper Application of the Fair Use Doctrine.

1. No Single Factor of the Four Listed in Section 107 Is Sufficient to Preclude a Finding of Fair Use.

In holding that intrinsic use "*precludes* an application of fair use," *Universal City Studios, Inc. v. Sony Corporation of America*, 659 F. 2d 963, 972 (9th Cir. 1981) (emphasis added), the Court of Appeals held an application of the first of the four fair use criteria listed in 17 U. S. C. § 107 (1976)—"the purpose and character of the use . . . ." —to dispose entirely of the question whether home VTR recording for private, noncommercial purposes constituted fair use. It is well-established, however, that the fair use doctrine represents an equitable rule of reason whose contours cannot be narrowly drawn by the application of any single criterion.[1]

1. Although the Court of Appeals did address other aspects of the fair use doctrine, *see* Part III, *infra*, it did so only after it had held unequivocally that intrinsic use and fair use were irreconcilable.

Section 107 identifies four factors that are material to a determination that a particular use of copyrighted matter is a fair use. The first factor of the four directs a court conducting a fair use inquiry to consider "the purpose and character of the use, including whether such use is of a commercial nature . . . ." The presence of a commercial use is to be weighed by the court against the conclusion that the use is fair. Although the statute expressly indicates that the characteristic of commercial use lessens the propriety of a finding of fair use, that characteristic alone is insufficient to preclude a finding of fair use: "[T]he fact that a given use is 'of a commercial nature' does not necessarily negate a fair use determination . . . ." 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05 (1981) (citing, *e.g., Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F. 2d 1171 (5th Cir. 1980); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966), *cert. denied*, 385 U. S. 1009 (1967); *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D. N. J. 1977)).

In *Triangle*, the United States Court of Appeals for the Fifth Circuit rejected the reasoning of a district court decision strikingly similar to that of the Ninth Circuit here. The district court in *Triangle* had held the commercial purpose of the use under consideration to preclude a finding of fair use: "The [District] Court established what amounts to virtually a *per se* rule that commercial motive destroys the defense of fair use." *Id.* at 1175. The Court of Appeals in *Triangle* held that the preclusive nature of the rule applied by the lower court was incompatible with the intent of section 107: "Clearly, § 107 makes commercial motive *relevant* to fair use analysis. But it is certainly *not decisive*." Id. at 1175 (emphasis added). The Court proceeded to analyze the question of fair use in terms of each of the criteria listed in section 107 and concluded on that basis that the use at issue was fair, notwithstanding its commercial purpose.

Similarly, in *Meeropol v. Nizer*, 560 F. 2d 1061 (2d Cir. 1977), *cert. denied*, 434 U. S. 1013 (1978), the Court of Appeals for the Second Circuit held that a purpose of commercial gain, although relevant to the question whether the use under consideration was fair, did not *preclude* a finding of fair use. The court stressed that all of the factors listed in section 107 "must be evaluated in concert." *Id.* at 1069.

It is thus well-established that the presence of a commercial use, which is specifically mentioned in section 107(1) as a factor that weighs against fair use, does not foreclose a finding of fair use. It follows *a fortiori* that the factor of intrinsic use, a subject on which the statute is silent, may not be applied to preclude a finding of fair use.

2. The Application of Arbitrary, Fixed Rules Is Antithetical to the Established Principle That Fair Use Analysis Should Be Equitable and Flexible.

The proposition applied by the court below that the sole characteristic of intrinsic use precludes a use from being fair is itself an example of the rigid formulae that proper fair use analysis must reject: "The line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria." *Meeropol v. Nizer, supra*, 560 F. 2d at 1068.[2]

In spite of the well-established prohibition articulated in *Meeropol*, the preclusive rule applied below is man-

2. The legislative history of 17 U. S. C. § 107 (1976) unambiguously states that that section embodies the judicial doctrine of fair use: "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976). Thus, the description of the fair use doctrine set forth in *Meeropol* pertains to the characteristics of the doctrine under the 1976 Copyright Act.

ifestly both "arbitrary" and "fixed." The rule is arbitrary in that there is no reason to suppose that intrinsic use, *e.g.*, viewing a VTR recording of an educational program, is inherently less deserving of fair use protection than altered-purpose use, *e.g.*, making wall-paper out of copies of pages of a telephone book.

The requirement that fair use analysis avoid the application of fixed criteria is a corollary of the notion that the fair use doctrine comprises an equitable rule of reason: "[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 65 (1976). The rule fashioned by the court below is "fixed" in that there is no suggestion in the court's language that it should be applied as a rule of reason on a case-by-case basis. Instead, the court's formulation commands that the factor of intrinsic use be deemed preclusive of fair use irrespective of variations in the application of the other enumerated criteria that invariably will occur under different factual conditions. Thus, the approach taken by the court below contravenes the well-established principle that fair use analysis should be flexible.

3. This Court Should Grant Sony's Petition for Certiorari in Order to Scrutinize the Degree to Which the Decision Below Would Contravene the Intent of the Congress as Set Forth in 17 U. S. C. § 107.

The holding of the Ninth Circuit that intrinsic use is inconsistent with fair use is at odds with legislative intent. For example, the Congress which passed the 1976 Act "did not require independent use when finding home use sound recording to be fair use." *Universal City Studios v. Sony Corp. of America*, 480 F. Supp. 427, 453 (C. D. Cal. 1979), *rev'd on other grounds*, 659 F. 2d 963 (9th Cir. 1981).

Moreover, section 107 is intended both to embody the judicially fashioned doctrine of fair use as it existed at the

time when the 1976 Act went into effect and to provide a framework for the continued evolution of the doctrine.[3] Notwithstanding the elusive definition of what the doctrine *is*, several assumptions about what it *is not* have remained constant in the cases that preceded the 1976 Copyright Act, in the legislative history of the Act, and, with the exception of the decision below, in the ensuing decisions rendered: No single factor precludes a finding of fair use; neither arbitrary nor fixed criteria inform whether a particular use is fair. The decision below stands each of these foundational assumptions on its head.

This Court should grant Sony's petition for certiorari in order to consider whether so dramatic a transformation of the fair use doctrine and so drastic a defiance of clear legislative intent represent a sound jurisprudential development. The Court should consider the issue now, before doctrinal departures from legislative intent become well-entrenched and correspondingly resistant to correction.

B. This Court Should Consider Now the Degree to Which Perpetuation of the Rule Applied Below Would Restrict Public Access to Information and Discriminate Against New Technological Uses.

As stated in Section A, *supra*, fair use analysis has been predicated consistently on the notion that no single criterion can be dispositive of the question whether a particular use is fair. The decision below, in holding the presence of a single factor to preclude a finding of fair use, disregarded the securely established prohibition against the application of narrow, arbitrary and fixed criteria in a fair use context. The impact of the Court of Appeals' error on the societal benefits provided by the fair use doctrine could be profound.

The purpose that animates the fair use doctrine is "to balance the author's right to compensation for his work,

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3. *See* note 2, *supra*.

on the one hand, against the public's interest in the widest possible dissemination of ideas, on the other." Latman, "Fair Use of Copyrighted Works" 5 (Sen. Comm. on Judiciary Study No. 141960) *quoted in, Triangle, supra,* 626 F. 2d at 1174. If the decision of the court below is permitted to stand, the public's interest in obtaining the widest possible access to ideas will be severely impaired in honor of a rule that is not required for the protection of authors.

Implicit in the principle that no single factor is sufficient to preclude a finding of fair use is the judgment that the author's right to compensation for his work is adequately protected by the application of the fair use factors "in concert." The preclusive rule applied below therefore constricts the previously recognized scope of the right of the public to obtain access to ideas. The Ninth Circuit approach would reject a fair use defense where, although the use is intrinsic, all of the other factors listed in section 107 militate strongly in favor of a finding of fair use. This approach would prevail whether or not it was actually necessary to advance a countervailing interest in protecting the needs of an author. However, the only justification for reducing public access to information is the interest in assuring for authors the rewards necessary to stimulate continuing creative incentive. That interest, as stated above, has long been fulfilled without resort to a preclusive rule by the application of all four factors in fair use analysis. Thus, the preclusive rule enunciated below, by constricting the appropriate scope of fair use, restricts public access to information. It would do precisely that in cases where a fair use defense would prevail were all four factors considered, without being necessary to fulfill any need that may arise to augment the rewards of authorship. The Ninth Circuit rule thus improperly diminishes the public's right to the dissemination of ideas.

The harmful impact of the decision below will extend far beyond the realm of home VTR users. The rule articulated below will prevent *any* intrinsic use from comprising

a fair use under section 107. Moreover, the principle that an application of the first criterion of section 107 can preclude a finding of fair use invites subsequent decisions to the effect that an application of any one of the remaining three criteria is sufficient to foreclose a finding of fair use. Such ramifications would constrict beyond recognition the present fair use doctrine, under which the rejection of a fair use defense must be predicated upon an application of all four criteria, and could restrict public access to information to an alarming and unnecessary extent.

The withdrawal of fair use protection that could occur were the decision below permitted to stand would be particularly injurious in the area of new technology. The Ninth Circuit recognized that technological advances, "place[d] a strain on the fair use doctrine." 659 F. 2d at 971. Despite that perception the court below did not give the fair use doctrine the flexible, equitable office to which it was entitled. To the contrary, the Ninth Circuit appeared to be willing to thwart technological development through an extremely narrow definition of the fair use doctrine. Moreover, the Ninth Circuit showed that it had no inclination to encourage future technological advances. For example, although the Court of Appeals must have recognized that developments such as the VTR represent great investments of capital on research and development, it directed that:

> "the district court should not be overly concerned with the prospective harm to appellees. A defendant has no right to expect a return on investment from activities which violate the copyright laws. Once a determination has been made that an infringement is involved, the continued profitability of appellees' businesses is of secondary concern." 659 F. 2d at 976.

The principle of *stare decisis* will tend to preserve an expansive approach to fair use insofar as there is further litigation involving the many uses already developed which

were considered in decisions rendered during the last one hundred and forty years.[4] However, the safeguard of *stare decisis* will afford more limited protection when addressing apparently novel questions regarding the application of the fair use doctrine in the context of new technology. Thus, uses enabled by new technological devices will be particularly vulnerable to the restrictive impact of the decision below. That particularly acute danger is likely to foreshadow a discriminatory impact upon such uses. Such a discriminatory impact would frustrate a central purpose of section 107, the provision of an equal quantum of protection to uses enabled by technological advances. As the legislative history of section 107 states: "[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976).

This Court should grant Sony's petition for certiorari in order to scrutinize the impact of the rule adopted below insofar as it has the potential to constrict the scope of public access to information and deter the development and utilization of new technological devices. This Court should examine the justification for such an impact in light of the circumstance that the rule applied below is not necessary to fulfill the needs of authors. The Court should consider that issue now, before harm to the public and to technological progress can occur.

C. This Court Should Consider Now Whether the Absence of Precedent Should Weigh Against a Conclusion of Fair Use Where New Technological Uses Are Concerned.

The Ninth Circuit weighed the purported dearth of precedent regarding the relevance of intrinsic use to the issue of fair use and the purported distinctions between

4. The origin of the fair use doctrine has been traced to *Folsom v. Marsh*, 9 Fed. Cas. 342, 348, No. 4,901 (C. C. D. Mass. 1841). A. LATMAN & R. GORMAN, COPYRIGHT FOR THE EIGHTIES, 460 (1981).

available precedent and the case before it in favor of its conclusion that the intrinsic use enabled by VTRs was not fair. *E.g.*, 659 F. 2d at 970. As stated in Section B, *supra*, the Congress that enacted 17 U. S. C. § 107 (1976) intended the fair use doctrine to accommodate uses enabled by technological advances: "[F]air use is a flexible tool which Congress specifically intended to handle new technologies." Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 STAN. L. REV. 243, 254 (1979). The unavailability of precedent considering the fairness of uses enabled by previously undeveloped technology should not be deemed relevant to the issue whether such uses are fair.

If the absence of precedent is permitted to be weighed against a fair use defense where the use under consideration is enabled by new technology, the proponents of such uses, which were by definition undeveloped when prior cases were decided, would suffer an inherent disadvantage in maintaining a fair use defense. Such a discriminatory impact is manifestly arbitrary and at odds with the intent of the drafters of section 107 to place new technological uses on an equal footing with more traditional uses in a fair use context: "The fluidity built into [Section 107] was designed to diminish the difficulty which arises when an innovation in technology makes possible new techniques of display that could not be contemplated by legislators in the year the statute was framed." Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 STAN. L. REV. 243, 254, n. 51 (1979) *quoting, Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 880 (S. D. Fla. 1978), [*aff'd*, 626 F. 2d 1171 (5th Cir. 1980)] [5]. Moreover, the development of a mode of analysis that would operate to discriminate against new technology in a fair use context could have a stifling effect upon progress in that field.

5. The decision of the Court of Appeals in *Triangle* is discussed in Part II. A. 1., *supra*. That decision was rendered after the publication of the student note.

This Court should grant Sony's petition for certiorari in order to consider the degree to which the absence of judicial precedent should be permitted to militate against a finding of fair use where the use under consideration is enabled by new technology. The Court should consider the issue now so as to minimize the discriminatory impact against new technological uses that would be engendered by judicial reliance on the absence of precedent in determining whether such uses are fair.

III. This Court Should Consider Now the Impact of a Rule That the Factor Set Forth in Section 107(3) Embodies a Purely Quantitative Substantiality Test.

The Ninth Circuit relied on a one factor "fair use" test. After holding that intrinsic use "precludes an application of fair use", it did, however, turn for confirmation of its conclusion to an examination of the other factors. That examination, too, provides reasons for this Court to review this case at this time. In discussing the application of subsection 107(3)—"the amount and substantiality of the portion used . . . ."—as a part of the inquiry whether home VTR usage comprised a fair use, the court below concluded that the quantitative substantiality of the copying under consideration "weighs heavily" against a finding of fair use. *Universal City Studios, Inc. v. Sony Corporation of America*, 659 F. 2d 963, 973 (9th Cir. 1981). Insofar as "the entire work is usually taken" where copying that employs new technology is concerned, A. Latman & R. Gorman, Copyright for the Eighties, 484 (1981), a purely quantitative construction of the substantiality factor places uses enabled by new technology at a disadvantage in obtaining fair use protection. The legislative intent that animates section 107 reveals, however, a purpose to render fair use protection equally accessible to old and new technologies: "[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." H. R. Rep. No. 94-1476, 94th

Cong., 2d Sess., 66 (1976). In order to reconcile that intent with the substantiality factor set forth in subsection 107(3), this Court should consider whether lower courts in conducting a fair use inquiry should be bound to apply one of the more refined, even-handed notions of substantiality set forth below.

A. Threshold Requirement of Harm.

The district court, having heard all of the evidence, concluded that the quantitative substantiality of the program copying involved in VTR home use did not weigh against a finding of fair use, given the absence of any reduction in the market for plaintiffs' works. *Universal City Studios v. Sony Corp. of America*, 480 F. Supp. 429, 454 (C. D. Cal. 1979), *rev'd*, 659 F. 2d 963 (9th Cir. 1981). This reasoning represents a sound approach to defining the significance factor in a fair use context.

Given the hypothetical fact that a plaintiff's market is impaired by the use in question, it is probable that a quantitative increase in the portion of the work copied would correlate with a reduction of the plaintiff's market for the work. *See* 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[D] (1981). In such a situation, because the quantum of appropriation relates to the policy that underlies the fair use doctrine of safeguarding the rewards of authorship, the factor of quantitative substantiality should be treated as relevant to the fair use inquiry.

Where, as the district court found here, the plaintiff's market for the work in question is not affected by the use under consideration, the quantitative substantiality of the copying yields no impact in terms of the objectives that underly the fair use doctrine of protecting authors while maximizing public access to information. The author is not harmed by the quantitative substantiality of the appropriation. It is thus laudable rather than objectionable that public access to information is increased by that substantiality. In this situation, therefore, the quantitative substantiality of the taking should be treated as irrelevant

to the issue whether the use is fair. Accordingly, insofar as the element of harm to the plaintiff's market is not engendered by home VTR use, the substantiality factor should not be deemed to weigh against a finding of fair use.

B. Quantitative Substantiality on a Sliding Scale.

A number of cases have recognized that the question to be addressed in applying the substantiality factor in a fair use context is not simply whether the copying under consideration was quantitatively substantial, but rather, whether it involved the appropriation of a quantity of the work in excess of the amount necessary to fulfill the purpose of the particular use. *See, e.g., Walt Disney Productions v. Air Pirates,* 581 F. 2d 751, 758 (9th Cir. 1978), *cert. denied,* 439 U. S. 1132 (1979), (parodist may appropriate quantity of work "necessary to conjure up the original," but no more); *New York Times Co. v. Roxbury Data Interface, Inc.,* 434 F. Supp. 217, 222 (D. N. J. 1977) ("The inadequacy of a pure quantitative approach obviously results from the fact that the quantum of appropriated material must be interrelated with a number of other factors, such as . . . the need to use the appropriated material in the manufacture of defendants' product . . . ."). *See also* Timberg, *A Modernized Fair Use Code for the Electronic as Well as the Gutenberg Age,* 75 Nw. U. L. Rev. 193, 218-19 (1980). To the extent that copying an entire television program is necessary to achieve the purpose of education or entertainment, the substantiality factor should not be deemed to "weigh heavily" against a finding of fair use.

C. Temporal Substantiality.

In recognition of the danger that a purely quantitative substantiality test could be weighed inappropriately against a finding of fair use in the context of VTR home recording for private, noncommercial use, one commentator has pro-

posed that the substantiality factor be read to include a temporal component for purposes of determining whether such use is fair:

> In the case of the Betamax, this flexibility [of the fair use doctrine] combined with the first amendment's interest in ensuring broad access to broadcast works, demands adding a new dimension—the temporal—to the concept of substantiality. Even the taping of an entire movie may be insubstantial if the tape is erased immediately after its only viewing.

Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 STAN. L. REV. 243, 256 (1979) (footnote omitted). Under a substantiality criterion that embodied a temporal aspect, characteristic VTR home use would not constitute a substantial appropriation.

D. Summary

The purely quantitative notion of substantiality applied by the court below places new technology, which tends to be employed to copy entire rather than partial works, at a substantive disadvantage in a fair use context. That disadvantage conflicts with the public policy in favor of the development of new technology, as well as with the specific intention of the drafters of section 107 to adapt the fair use doctrine to the equal advancement of new technological uses.

This Court should grant Sony's petition for certiorari in order to refine the concept of substantiality to be applied in a fair use context by incorporating within that concept one or more of the notions of substantiality sketched above. This Court should consider that issue now in order to circumvent the discriminatory impact against new technologies in a fair use context that will result from the continued application of the purely quantitative test relied upon below.

CONCLUSION

For each and all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

PETER F. MARVIN
(Counsel of Record)
CHRISTIAN H. MILLER
MILLER SCHREIBER & SLOAN
1529 Walnut Street
Philadelphia, PA 19102
(215) 567-4900
Attorneys for CES Publishing Corp., Amicus Curiae

Amicus Brief

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SONY CORPORATION OF AMERICA, *et al.*,
Petitioners,
v.
UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,
Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. EDWARD DAY
(Counsel of Record)
WILLIAM K. BLACK
GARY J. SHAPIRO
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-6600
Attorneys for Amicus Curiae
Consumer Electronics Group of the Electronic Industries Association

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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I

THE CONSUMER ELECTRONICS GROUP REPRESENTS SUBSTANTIALLY ALL OF THE COMPANIES OFFERING VIDEO TAPE RECORDERS FOR SALE IN THE UNITED STATES

This brief is submitted by the Consumer Electronics Group of the Electronic Industries Association ("EIA/CEG") with the written consent of all parties on file with the Clerk of this Court. EIA/CEG is a 56-year-old trade association with headquarters in Washington, D.C. Its members include almost all of the domestic manufacturers of television receivers and nearly all foreign-owned or affiliated manufacturers having facilities in the

United States. Almost all companies that sell video tape recorders ("VTRs") at the manufacturer's level in the United States are members of EIA/CEG.[1]

This *amicus curiae* brief is submitted pursuant to authorization by the Board of Directors of EIA/CEG. The vital interests of the television receiver and VTR industry are at stake in these proceedings, and as a representative of nearly all VTR manufacturers and sellers of the product at the manufacturer's level in this country, EIA/CEG has a crucial interest in supporting the Petition for *Writ of Certiorari* filed by Sony Corporation of America, *et al.*

II

THE VIDEO TAPE RECORDER HAS MANY USES

The VTR is a multipurpose consumer electronic device which has revolutionized the concept of home entertainment. The VTR can be used for many purposes including time shifting, playing of prerecorded programming, and recording of and watching home movies.

A. Time Shifting

"Time shifting" reflects the advantage offered to the consumer from the VTR's ability to shift in time a television program. By time shifting, a VTR owner who is not at home can record programs for later viewing. A VTR user can also time shift by recording one program while watching another.

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[1] They are as follows: General Electric Company; Matsushita Electric Corporation of America (Panasonic and Quasar); N.A.P. Consumer Electronics Corporation (Magnavox, Philco and Sylvania); RCA Corporation, Consumer Electronics Division; Sansui Electronics Corporation; Sanyo Manufacturing Corporation, Sony Corporation of America; Toshiba America, Inc.; U.S. JVC Corporation; Zenith Radio Corporation. Though not members of EIA/CEG, Hitachi Sales Corporation and Sharp Electronics Corporation have each given their full support to the position taken here by EIA/CEG.

Without question, the primary use of the VTR is time shifting. Petitioner Sony's survey found that 96 percent of VTR owners use their VTR primarily to view television programs that they could not otherwise have watched (Pet. App. at 48).[2] Even respondent MCA's survey found that 75.4 percent of all VTR owners use their machine to record for time shifting half or most of the time (Pet. App. at 47-48).

B. Home Movies

Another, increasingly popular, use of the VTR is to make original movies.[3] By using a video camera, a VTR owner can inexpensively record on blank video tape. Indeed, it is over 50 times more costly to record home movies using eight millimeter film than it is to record the same amount of time on video tape.[4] Home movies recorded on video tape can also be played back immediately through a VTR and shown on a television screen, whereas traditional home movies require the time to develop the movie and the inconvenience of setting up a projector and screen.[5]

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[2] References to "Pet. App." are to the Appendix of Petitioner Sony Corporation of America filed with its Petition for Writ of Certiorari.

[3] *See, e.g.*, Hughey, *Sales of Home-Movie Equipment Falling as Firms Abandon Market, Video Grows*, Wall St. J., March 17, 1982, at 29 col. 4.

[4] "A reusable videotape lasting two hours or more costs between $12 and $18, compared with about $10, including developing, for a 3½ minute role of eight millimeter movie film." *Id.*

[5] *Id.* Given the advantages of home video movies, it is unsurprising that January and February 1982 sales of color video cameras jumped more than 78 percent over January and February 1981 sales. Consumer Electronics Daily, March 15, 1982, p. 2.

C. Prerecorded Tapes

VTRs are also used extensively to play prerecorded programming.[6] Over 35,000 prerecorded video programs are currently available.[7] By allowing VTR users to watch prerecorded programming in the privacy of their homes, the VTR has expanded consumer home viewing alternatives and created a large market for entertainment programming. It has also created an enormous market for producers and users of educational, instructional and business oriented programming.

D. Other Uses

The VTR is expected to become an essential component of at least one American manufacturer's projection television system.[8] In the future, the VTR is also likely to serve an essential role in the new electronics media by storing and displaying teletext, videotext, home computer graphics and electronic photography.[9]

These uses of the VTR, which do not even arguably infringe on anyone's copyright, underscore the tremendous home entertainment breakthrough the VTR has bestowed upon consumers.

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[6] *See, e.g.*, Variety, Mar. 10, 1982, pp. 35-36.

[7] National Video Clearinghouse, Inc., *The Video Source Book* (3d ed. 1981).

[8] Bulkeley, *Inventor Kloss Trying for the Fourth Time to Turn His Ideas Into a Healthy Business*, Wall St. J., March 16, 1982, at 31 col. 4.

[9] Teletext is a new television broadcast service which will require a special decoder for reception, videotext is an analogous service that transmits data over telephone lines for display on television receivers, and electronic photography stores an "image" without the use of film or videotape which can be stored and displayed using a VTR. The first two services are in commercial use abroad and will soon be in commercial use here. Electronic photography/VTR usage is at the prototype stage.

III

THE COURT OF APPEALS' DECISION FINDING THE SALE AND HOME USE OF VTRS ILLEGAL HAS A FAR REACHING EFFECT ON INDUSTRY

The Court of Appeals' decision holding VTR use by consumers to be copyright infringement and Petitioners liable for contributory infringement is of critical importance to the consumer electronics industry in general, and to the home video recording industry in particular.

Over three million VTRs have been sold in the United States [10] at a range in retail price between $500 and $1,600.[11] Thus, over ten million Americans now use a VTR in their homes and have invested well over two billion dollars in VTRs, and at least half as much in related products such as video tapes and video cameras.[12]

The VTR's popularity has also had a positive economic effect on many sectors of the economy. Millions of dollars have been spent on advertising VTRs and prerecorded tapes.[13] Thousands of video specialty stores have opened to serve the VTR user.[14] In addition, the VTR has opened a large and lucrative multimillion dollar market for prerecorded programming producers, such as respondent MCA, Inc.[15]

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[10] THE HOME VIDEO & CABLE REPORT, March 8, 1982, at 3.

[11] Federal Communications Commission—Network Inquiry Special Staff, Appendix by D. Agostino "Home Video: A Report on the Status, Projected Development and Consumer Use of Videocassette and Videodisc Players" (1980) p. 34.

[12] *Id.* at 35.

[13] Nine major sellers of VTRs spent more than $44,000,000 on VTR advertising during a five year period prior to June 1980. ADVERTISING AGE, June 2, 1980, at 67.

[14] It is estimated that 2,000 to 3,000 video specialty stores opened in 1980 alone. THE HOME VIDEO REPORT, March 30, 1981 at 1.

[15] The International Tape/Disc Association bestows a "Golden Videocassette Award" to each prerecorded movie which has achieved

Sales of VTRs continue to increase. In 1981, VTR sales jumped more than 61 percent over those in 1980.[16] Absent adverse judicial or legislative intervention, it is expected there will be about 20 million VTR homes by 1986.[17]

The Court of Appeals suggests that the District Court, in fashioning a remedy, should consider whether to enjoin the sale of VTRs, levy a continuing royalty, or impose statutory damages (Pet. App. at 28-29). These penalties would be crippling, if not fatal, to the growing VTR industry. Worse, the Court of Appeals has directed the District Court to impose this punishment with little consideration to the viability of a billion dollar industry which employs tens of thousands of Americans and without regard to the millions of consumers who own or plan to buy a VTR.[18]

IV

THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER A SO-CALLED INTRINSIC USE PRECLUDES A FINDING OF FAIR USE

A. The Traditional Fair Use Doctrine

The fair use doctrine is entirely equitable. *Iowa State University Research Foundation, Inc. v. American Broadcasting Co.*, 621 F.2d 57, 62 (2d Cir. 1980). As this Court has explained, the copyright laws reflect a "balance of competing claims upon the public interest: Creative work is to be . . . rewarded, but . . . must ulti-

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$1 million in video cassette sales. As of this writing, 109 Golden Videocassette Awards have been granted. MCA Videocassette Inc. has received 21 of these.

[16] THE VIDEO RETAILER, March/April 1982.

[17] Variety, Jan. 6, 1982 at 1.

[18] The Court of Appeals all but conceded that its decision will have a disastrous effect on the industry with its assertion that "the continued profitability of appellees' businesses is of secondary concern" (Pet. App. at 29).

mately serve the cause of promoting broad public availability . . . ." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). "Since the issue of fair use is one of fact . . . the ["]clearly erroneous["] standard of review is appropriate." *MCA, Inc. v. Earl Wilson*, 1981 COPYRIGHT LAW DECISIONS ¶ 25,287 at 16,582 (2d Cir. 1981). Here, the Court of Appeals did not declare any of the trial court's findings to be clearly erroneous.

B. The Court of Appeals' Intrinsic Use Rule

The Court of Appeals, however, in a major departure from existing law, has declared that no balancing test should be employed with regard to VTRs. It ruled that a so-called "intrinsic use" cannot be a fair use regardless of the balance of the equities (Pet. App. at 18). The Court of Appeals defined an intrinsic use as a use of the copy for the same purpose that the original served. In reaching this ruling, the Court of Appeals acted in express conflict with the decision of the Court of Claims [19] and the factual findings of the trial court and in derogation of the principles underlying the fair use doctrine enunciated by Congress and the Judiciary. The result, when combined with the Court of Appeals' novel and draconian expansion of the contributory infringement doctrine, is a major assault on copyright law under the new Act, and a direct threat of extinction for the VTR industry and inevitable disruption of other industries which also make possible intrinsic uses, *e.g.*, photocopiers and audio tape recorders.

While apparently recognizing that the fair use doctrine requires "balancing the equities" the Court of Appeals refused to employ the normal balancing test because it felt that such balancing was "hostile . . . to the rights of copyright holders" (Pet. App. at 18). The Court of Appeals felt that "[n]ew technology . . . places

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[19] *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

a strain upon the fair use doctrine" and implied (with apparent disfavor) that new technology would generally be classified as a fair use if the balancing test were used. *Id.*

The fear that the copyright holder will "lose" is not a principled reason for not employing the balancing test that has always been the heart of the fair use doctrine. Moreover, substituting a mechanistic rule that an intrinsic use "precludes" a finding of fair use with regard to new technology (Pet. App. at 18) is contrary to the express will of Congress. As the House Report accompanying the 1976 Copyright Act explained:

> *General intention behind the provision*
>
> The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 66, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 5680.

Congress did not share the Court of Appeals' hostility to new technology. It directed a flexible, case-by-case balancing process such as the trial court employed in finding fair use. Congress deliberately eschewed in-

flexible rules-of-thumb of the kind relied upon by the Court of Appeals.

The Court of Appeals also failed to explain *why* an intrinsic use should preclude fair use. An intrinsic use, in certain circumstances, may yield smaller benefits than other uses, but the normal balancing test would take account of such a reduction in benefits. It cannot be gainsaid that new technology employing intrinsic uses, *e.g.* VTRs and photocopiers, are perceived by consumers as being tremendously beneficial. Indeed, it is precisely because the Court of Appeals feared that VTRs would be found so beneficial that it refused to "balance the equities" (Pet. App. at 18).

The Court of Appeals attempted to picture its actions as the product of judicial restraint and deference to Congress, but its actions belie its characterization. The Court of Appeals refused to employ the case-by-case balancing process mandated by Congress with regard to new technology and fair use because the Court of Appeals made a policy judgment that such a process would prove too "hostile" to copyright owners. This is a classic example of a court substituting its policy judgment for that of Congress.

The Court of Appeals acknowledged that its intrinsic use rule was contrary to *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975). The Court of Appeals attempted to savage that decision by stating that it "has been appropriately regarded as the 'Dred Scott decision of copyright law'" (Pet. App. at 15, quoting Nichols, J. in dissent, 487 F.2d at 1387). This *ad hominem* attack ignores the fact that Congress essentially adopted the *Williams & Wilkins Co.* decision in Section 108 of the Copyright Act of 1976 (the "Act"), 17 U.S.C. § 108, and took the four illustrative fair use factors listed

in Section 107 of the Act from the decision. Moreover, the implication that four judges of this Court voted to affirm a "Dred Scott" decision demonstrates the rhetorical excesses that have been substituted for legal reasoning. There is an urgent need for decision by this Court to resolve this serious conflict in the interpretation of fair use.

V

THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE COPYRIGHT HOLDER IS ENTITLED TO AN IRREBUTTABLE PRESUMPTION OF INJURY

VTRs are unprecedented. Their primary uses, time shifting and display of prerecorded video tapes, *benefit* copyright holders.

The goal of a television broadcaster is to induce as many people as possible to watch its programs. Some potential viewers, however, cannot be home or are doing something else when a program they would like to watch is broadcast. By using a VTR to "time shift," which the trial court found to be the primary use of VTRs, those potential viewers are able to become actual viewers and the goal of the broadcaster [20] is enhanced by the VTR. The trial court found that VTRs had this potential to benefit copyright holders by expanding viewing of their programs (Pet. App. at 110, 112).

The Court of Appeals did not declare that finding, or the trial court's finding that the plaintiffs below were not injured by VTR usage, to be clearly erroneous. The Court of Appeals, however, concluded on the basis of *a*

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[20] Maximum viewership is also the goal of advertisers and producers who sell copyright interests to broadcasters. Projected audience size determines advertising rates and sales prices for copyrighted productions. Thus, VTR time shifting usage indirectly provides greater economic incentives to authors. *See* Pet. App. at 51.

priori reasoning that there *must* be injury. Its logic was two-fold. First, the Court of Appeals declared that:

> It is clear that home users assign economic value to their ability to have control over access to copyrighted works. The copyright laws would seem to require that the copyright owner be given the opportunity to exploit this market (Pet. App. at 24).

With respect, this is a *non sequitur*. The copyright holder does not control access to televised programming in the sense envisioned by this quotation. Once broadcast, anyone can view a normal television signal—no license is required, only a television receiver. The commercial networks spend millions of dollars trying to maximize viewership. Viewers "assign economic value" to a television receiver because it gives them "access to copyrighted works," but they pay no fee to copyright holders when they purchase the receiver. As noted above, copyright holders "exploit this market" through payments they receive based on projected viewers of their program and the resultant advertising rates. Thus, copyright holders already "exploit" the VTR market and they do so in the identical manner in which they exploit the general television market.[21]

The Court of Appeals' second resort to *a priori* reasoning was the following:

> The court, in analyzing the fourth fair use factor, did not pay sufficient attention to the *cumulative* effect of mass reproduction of copyrighted works made possible by videorecorders. It seems clear that absent an inquiry which takes into consideration the full scope of the "infringing" practice, copyright plaintiffs, in cases of this sort, would face insupera-

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[21] Note that in both cases there is no control over whether the viewers will actually watch the advertising that is the economic base for commercial broadcasting.

> ble obstacles to the protection of their rights. And, where one looks at the full scope of the activity in question, it seems clear that it tends to diminish the *potential* market for appellants' works (Pet. App. at 24-25) (emphasis in original).

Again, things were "clear"[22] to the Court of Appeals without any citation to the trial record, indeed, directly contrary to the trial court's findings of no injury and potential financial benefit from VTR usage.

Even a brief examination reveals that there is no *a priori* means of finding that the *cumulative* effect must tend to diminish the copyright holder's *potential* market. The alleged infringement in time shifting is recording a program, that the viewer ordinarily would have missed, for viewing at a later time. *A priori* reasoning suggests that this "infringement" increases viewership of the "infringed" program. A study commissioned by the Federal Communications Commission confirms this reasoning.

> Because both major rating services—A. C. Nielsen and Arbitron—now include an indication of VCR use, this time-shift phenomenon should actually be an asset to the networks and broadcasters. Shows which would have been missed can now be recorded for later viewing. Because rating services are prepared to report such time-shifting, broadcasters should actually be helped by this consumer convenience. An audience that was previously unavailable to them is now viewing, and the viewing is properly attributed in audience reports.[23]

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[22] The Court of Appeals used the same phrase "it seems clear" or a variant thereof four times in a single page of the official reporter (659 F.2d at 974) in its discussion of injury. No citation to the trial record was made in that entire discussion. *See* Pet. App. at 22-25.

[23] Federal Communications Commission—Network Inquiry Special Staff, Appendix by D. Agostino "Home Video: A Report on the

The *cumulative* effect as VTR ownership expands is to increase significantly the copyright holder's market. Indeed, the "genius of Betamax" is that it converts a *potential* market for the "infringed" program into *actual* viewers by allowing time shifting. Similarly, the growing use of VTRs to display prerecorded videotapes has *created* an entirely new market for copyright holders that brings them many hundreds of millions of dollars.[24] Other VTR uses, *e.g.*, home movies, teletext, electronic photography, present no copyright dangers and may also create new markets for copyright holders.

Even so-called "librarying" was found by the trial court not to injure copyright holders (Pet. App. at 112-13).[25] In sum, *a priori* reasoning suggests that VTR use *benefits* copyright holders and converts potential markets into actual viewers. Moreover, the *cumulative* effect as VTR usage grows will be to increase these benefits. Most importantly, however, the evidence at trial and the trial court's findings support this same conclusion. The Court of Appeals has created an irrebuttable presumption of injury which is contrary both to fact and logic.

Once more the Court of Appeals said that it need not reach the issue of injury given the intrinsic use of VTRs. The Court of Appeals did not explain why this was the case. The entire equitable, balancing test nature of the fair use doctrine is perverted by the holding that a use which benefited the copyright holder can not be a fair use.

Status, Projected Development and Consumer Use of Videocassette Recorders and Videodisc Players" p. 61 (1980).

[24] Approximately six million prerecorded video cassettes were sold in the United States in 1981 at an estimated *wholesale* value of over $400 million. *See, e.g.*, Variety, March 10, 1982, pp. 35-36.

[25] Moreover, the dramatic growth of prerecorded video tapes has greatly reduced any incentive for librarying. Prerecorded tapes have no commercials, they are not edited for television, their quality is superior to home "off-air" taping, and they are cheaper to rent than the cost of blank tape for home taping.

VI

THIS COURT SHOULD RESOLVE THE ISSUES CREATED BY THE COURT OF APPEALS' TEST FOR CONTRIBUTORY INFRINGEMENT

The Court of Appeals' test for contributory infringement represents an unprecedented expansion of contributory liability. Such a test will disrupt copyright and patent law unless corrected by this Court.

The Court of Appeals addressed the issue of contributory infringement by again ignoring the record and the trial court's findings of fact and declaring, on the sole basis of a treatise, that VTRs are not "suitable for substantial noninfringing use" (Pet. App. at 26). This is simply wrong. The trial court found to the contrary and it is indisputable that a wide range of VTR uses, *e.g.*, display of prerecorded videotapes, teletext, videotext, electronic photographs and home movies and the display of the extremely broad range of broadcast material which is either not copyrighted or of which the copyright holder has no objection to such use (*see*, *e.g.*, Pet. App. at 114). Indeed, the evidence at trial was that respondents' programming represents less than five percent of all commercial programming and none of the programming on public television (R.T. 314-15, 523-33, 549-50).

The Court of Appeals' only response to these facts was the assertion:

> That some copyright holders choose, for one reason or another, not to enforce their rights does not preclude those who legitimately choose to do so from protecting theirs (Pet. App. at 26).

With respect, we submit that this assertion misses the point. The issue here is whether sale of a product, VTRs, should be unlawful as an act of contributory infringement. If noncommercial home taping were found to be

an infringement, but VTR sales were not held to be contributory infringement, respondents would not be "preclude[d]" from "protecting" their rights by suing the infringing parties. It would be absurd, however, to bar the sale of VTRs because a minority of producers objected to VTR use while the majority favored, or did not object to, VTR use, because of the benefits that VTRs bring such broadcasters and copyright holders. The Court of Appeals is allowing a tiny minority of producers to "preclude" *all* consumers, copyright holders and broadcasters from using VTRs for all purposes—even purposes which are admitted to be noninfringing and beneficial to other copyright holders. If respondents prevail on their general infringement theory, let them, if they wish, enforce their rights against such infringement, but do not allow them to impose their will on others under a contributory infringement rationale.[26]

The Court of Appeals again assumed facts contrary to the trial record and the trial court's finding of facts in discussing whether VTR manufacturers met the definition of contributory infringement.

> We adopt the district court's definition: "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer . . . ." There can be no doubt that the corporate appellees meet this definition (Pet. App. at 27).

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[26] Respondents might find enforcement against the direct infringers impractical. This is doubtless true of copyright holders experiencing infringements through the use of photocopiers, cameras and tape recorders. It has never been suggested, however, that enforcement difficulties warrant a finding of contributory infringement. Respondents' enforcement problems result from their own decision to broadcast their programs over the public airwaves into the privacy of tens of millions of American homes in conjunction with a vast number of other producers who do not object to VTR use.

The trial court, however, found that the respondents had presented "no evidence" that petitioners' activities had induced or caused any of the acts of alleged infringement introduced at trial (Pet. App. at 96-97). It would expand the doctrine of contributory infringement to an enormous size—capable of devouring the photocopier, camera and audio tape recorder industries as well—to hold that a new technology was unlawful on the theory that without the technology the infringement would not occur.

VII

THE REMEDIES SUGGESTED BY THE COURT OF APPEALS ARE INEQUITABLE, IMPROPER AND WOULD IMPAIR OR ELIMINATE AN ENTIRE INDUSTRY

The Court of Appeals, after concluding that petitioners were liable as contributory infringers, directed the district court to consider an array of remedies including an injunction, statutory damages or a continuing royalty (Pet. App. at 28-29). It also instructed the district court that the "prospective harm" and "continued profitability of [petitioners'] businesses is of secondary concern" as there is "no right to expect a return on investment from activities which violate the copyright laws" (Pet. App. at 29).

An injunction on the sale of VTRs would eliminate the VTR industry in this country. An injunction against VTR sales would deprive the public of a device which provides numerous benefits, most of which are not even arguably infringing and many of which accrue to copyright holders.[27]

Statutory damages would also destroy the VTR industry in this country. The minimum amount of statutory damages per infringement is two hundred fifty dollars

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[27] *See, supra* at 2-4, 11-14.

($250), which under respondents' theory of contributory infringement would cause an astronomical damage award.

The Court of Appeals' suggestion that a continuing royalty be imposed by the district court demonstrates the extraordinary judicial activism engaged in by the Court of Appeals. Not only is this suggestion an unprecedented expansion of judicial authority, but it is an outright usurpation of congressional authority. Moreover, the proposal is completely unworkable. Unfortunately, it will stand as precedent until and unless this Court acts.

VIII

CONCLUSION

As the representative of nearly all VTR and blank video tape manufacturers and sellers of these products at the manufacturer's level, EIA/CEG urges the grant of the Petition for *Writ of Certiorari* filed by Sony Corporation of America in this case. The issues involve the viability, and perhaps the survival, of a major, rapidly growing, new industry.

Respectfully submitted,

J. EDWARD DAY
(Counsel of Record)

WILLIAM K. BLACK
GARY J. SHAPIRO
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-6600

Attorneys for Amicus Curiae
Consumer Electronics Group of the Electronic Industries Association

Amicus Brief

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In The

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GENERAL ELECTRIC COMPANY, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., N.A.P. CONSUMER ELECTRONICS CORP., PANASONIC HAWAII, INC., RCA CORPORATION, US JVC CORP., AND VICTOR COMPANY OF JAPAN, LTD., AS *AMICI CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MORTON AMSTER
JESSE ROTHSTEIN
AMSTER, ROTHSTEIN & ENGELBERG
Attorneys for Amici Curiae
90 Park Avenue
New York, New York 10016
(212) 697-5995

ANTHONY F. LO CICERO
JOEL E. LUTZKER
Of Counsel

6619
LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 542-1114

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PRELIMINARY STATEMENT

This Amicus Brief is presented by General Electric Company, Matsushita Electric Corporation of America, Matsushita Electric

Industrial Co., Ltd., N.A.P. Consumer Electronics Corp., Panasonic Hawaii, Inc., RCA Corporation, US JVC Corp., and Victor Company of Japan, Ltd. (collectively "Amici") pursuant to Rule 36.1 of the Supreme Court Rules, with the written consent of all parties on file with the Clerk of this Court. This Amicus Brief is in support of the petition of Sony Corporation ("Sony"), Sony Corporation of America ("Sonam") — the manufacturer and U.S. distributor, respectively, of Betamax brand videotape recorders — and others[1] that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the present action on October 19, 1981, 629 F.2d 963 (the "*Sony* decision").

INTEREST OF AMICI

Amici General Electric Company (GE brand), Matsushita Electric Corporation of America (Panasonic and Quasar brands), N.A.P. Consumer Electronics Corp. (Sylvania, Magnavox and Philco brands), Panasonic Hawaii, Inc. (Panasonic brand), RCA Corporation (RCA brand) and US JVC Corp. (JVC brand) each distribute and sell videotape recorders ("VTRs") in the United States. Amici Matsushita Electric Industrial Co., Ltd. and Victor Company of Japan, Ltd. each manufacture VTRs which are distributed and sold in the United States. VTRs manufactured, distributed and sold by Amici play an important role in the expanding U.S. VTR market.

Thus, the Amici are manufacturers or distributors of VTRs which are competitive with the Betamax brand VTR manufactured by Sony, the subject matter of the present action. All Amici have participated in the creation of a young, vigorous and already

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1. The other petitioners are Sony's former national advertising agency for Betamax brand videotape recorders and four Betamax retailers.

important U.S. industry which is directly and severely threatened by the *Sony* decision. The Ninth Circuit held that in-home, private, non-commercial off-the-air recording of copyrighted television broadcast materials constituted copyright infringement and that manufacturer Sony, distributor Sonam, retail sellers and advertisers of Betamax VTRs were contributory infringers. The questions raised by the *Sony* decision transcend interests of the specific petitioners and facts presented herein and have a direct economic impact on the entire VTR industry, including Amici and other manufacturers and distributors of VTRs, advertisers of VTRs, retailers selling VTRs and related products to the purchasing public, and the vast consuming and viewing public itself — the ultimate users of VTRs. The broad sweep of these issues, and of the *Sony* decision, extends to and potentially damages other industries as well by calling into question long existing interpretations of both the 1976 Copyright Act, 17 U.S.C. §§101 *et seq.* and the prior 1909 Copyright Act, 61 Stat. 652, as amended.

On November 6, 1981, less than three (3) weeks after the *Sony* decision, Universal City Studios, Inc. ("Universal"), one of the plaintiffs herein,[2] commenced an action ("*Universal v. RCA et al.,*" No. 81-5723 FW, C.D. Cal.) against a total of 42 defendants, subsequently expanded by amendment to 50 defendants, including Amici, other manufacturers and distributors of VTRs, and their advertising agencies. Although different in several important and potentially dispositive respects from the present action, *Universal v. RCA et al.* similarly involves the charge that the in-home, non-commercial, private, off-the-air video recording of copyrighted works constitutes copyright infringement, for which the manufacturers, distributors and advertisers of VTRs are all liable. In *Universal v. RCA et al.,* Universal has asked

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2. The other plaintiff, Walt Disney Productions, apparently decided not to join Universal in its subsequent action.

for an injunction "to protect plaintiff's copyrighted motion pictures from recording and copying on the aforesaid VTRs and videocassettes," damages, profits resulting from manufacture and sale of VTRs, and other relief.

By commencing *Universal v. RCA et al.*, Universal has manifested its intention to extend the erroneous holding of the *Sony* decision to the entire U.S. VTR industry and to extract additional payments beyond those which it bargained for when it sold or licensed its copyrighted works for public broadcast. It seeks to either halt or obtain secondary payment from an entire industry in a context where, as will be discussed below, Universal has and uses, or could use if it chose to, an established mechanism to obtain full commercial compensation for the very activities about which it complains.

SUMMARY OF ARGUMENT

The economic importance of the U.S. VTR industry supports the grant of certiorari. Total retail sales of Amici's VTRs and related products in 1981 exceeded an estimated 1.2 Billion Dollars ($1,200,000,000). It is believed that the total VTR industry in the United States is substantially larger at present and is growing quickly. The *Sony* decision poses a grave threat to the continued existence of Amici's VTR businesses, and the U.S. VTR industry in general.

There are significant questions of law raised by the Ninth Circuit's erroneous application of the 1976 and 1909 Copyright Acts to the new technology of home VTRs which support the grant of Sony's petition. In other cases involving the copyright law and the closely related field of the patent law [*see* Section IV(B), *infra*], in which new technology has seemingly run afoul of statutory language, this Court has granted certiorari to resolve questions similarly significant, novel and deserving of this Court's attention as the issues presented herein.

This Court should also grant certiorari to resolve the major legal conflicts raised by the Ninth Circuit's failure to follow this Court's decisions in *Teleprompter Corp. v. Columbia Broadcasting Systems Inc.*, 415 U.S. 394 (1974) ("*Teleprompter*") and *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U.S. 390 (1968) ("*Fortnightly*").[3]

In *Teleprompter*, this Court held that claims of copyright infringement in the television broadcast field and specifically in the then emerging field of community antenna television ("CATV") required an analysis of compensation paid to the copyright proprietor. The *Sony* decision expressly rejects this criterion and, as a result, misapplies both the 1976 Copyright Act and the 1909 Copyright Act in its determination of the issue of infringement and the application of the doctrine of fair use.

Both *Teleprompter* and *Fortnightly* also held that CATV system operators, who merely aided and abetted the viewing of copyrighted broadcast works, were not to be considered copyright infringers. VTR manufacturers and distributors stand in a position directly analogous to the CATV system operators who were alleged to infringe in *Teleprompter* and *Fortnightly*. The *Sony* decision, without any analysis or explanation, ignores factual findings made by the trial court (480 F. Supp. 429), reaches its own contrary findings with no basis in the trial record and, in violation of *Teleprompter's* teachings, totally disregards the actual effect of VTRs on the pattern of television viewing on the one hand and the actual relationship between the copyright proprietor and the ultimate television viewer on the other. The Ninth Circuit reached

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3. This case also presents this Court with the opportunity to confirm that the equitable methods of analysis utilized in *Teleprompter* and *Fortnightly* dealing with performance rights under the 1909 Copyright Act are equally applicable to reproduction rights under the 1976 and 1909 Copyright Acts.

an erroneous conclusion which has upset established understandings of the Copyright Law and will cause great damage to the VTR industry, the public, and possibly other industries as well. The decision should be reviewed by this Court.

ARGUMENT

I.

THE ECONOMIC IMPORTANCE OF THE U.S. VTR INDUSTRY SUPPORTS THE GRANT OF CERTIORARI.

The *Sony* decision threatens the existence of a relatively new, but rapidly expanding, U.S. industry, including, but not limited to, Amici. The specific VTR commerce in the United States which has been generated by Amici and which is now in jeopardy, includes the following:

> (a) Among them, Amici sold over nine hundred thousand (900,000) VTRs in the U.S. in 1981 for a total wholesale sales volume of Seven Hundred Million Dollars ($700,000,000). They also sold in that year over one hundred and twenty-five thousand (125,000) color cameras for use with VTRs representing a sales volume of over One Hundred Million Dollars ($100,000,000) and about seven million (7,000,000) videocassettes for use in VTRs for a sales volume of over Seventy Million Dollars ($70,000,000). Total retail sales of Amici's VTRs and related products in 1981 exceeded an estimated 1.2 Billion Dollars ($1,200,000,000), a major portion of which represents mark-ups in the United States and, therefore, expenditures and profits of U.S. business. VTRs, cameras and videocassettes sold by Amici have reached all

segments of the U.S. viewing public and have been sold in all states. The *Sony* decision, which held that injunctive relief could be appropriate, threatens the continued sale of such products.

(b) Amici and their distributors and retailers operate in every state of the nation. The *Sony* decision threatens untold thousands of business activities in every state and the private rights of millions of U.S. consumers.

(c) As indicated by the presence of advertising agencies as defendants in this case and as defendants in *Universal v. RCA et al.*, advertising and promotional activities play an important part in the U.S. VTR industry. The *Sony* decision threatens these advertising and promotional activities, and the jobs of the people engaged in the same.

(d) The sale of VTRs and videocassettes generates sales tax payments to state and local governments amounting to tens of millions of dollars. In addition, the businesses and employers who distribute, sell and advertise VTRs in the United States pay additional income taxes to state, federal and local governments. The *Sony* decision jeopardizes all of those tax payments.

In view of the importance of the U.S. VTR industry, and the imminent threat posed to that industry and to the continued enjoyment of the benefits of new technology by U.S. consumers, this Court should grant certiorari.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DECIDE IMPORTANT ISSUES RELATING TO THE INTERACTION BETWEEN EMERGING TECHNOLOGY AND EXISTING STATUTORY PROVISIONS.

The question of whether the private, in-home, non-commercial recording of off-the-air television broadcasts is copyright infringement is but one more example where emerging technology has outpaced specific statutory language, thereby requiring action by this Court.[4]

Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) ("Fortnightly") presented this Court with the question of whether the retransmission by cable of copyrighted television broadcast materials within the local broadcast range of the originating TV station was an infringement of the plaintiff's copyrights. Thereafter, in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974) ("Teleprompter"), the CATV system operator defendants not only copyrighted works, but went so far as to retransmit them to remotely located subscribers who would not otherwise have been able to receive the original local broadcast. They also originated other programming themselves and sold commercials. In both *Fortnightly* and *Teleprompter,* this Court granted certiorari and dealt with allegations of copyright infringement resulting from

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4. Neither the 1976 Copyright Act, nor the 1909 Copyright Act includes specific statutory authorization for this activity. Amici join petitioners in contending that the statutory history of the 1976 Copyright Act (and of the prior 1971 Sound Recording Act, Pub. L. 92-140, 85 Stat. 391) supports an interpretation which would exempt home video recording, and that the "fair use" doctrine, as codified in 17 U.S.C. §107, should be interpreted to include such private home use.

use of a new technology which could not be resolved by simple reference to existing statutory language. In each case, this Court held that there was no infringement.[5]

Certiorari also was granted in *Williams & Wilkins Co. v. United States,* 487 F.2d (Ct. Cl. 1973), *affirmed by an equally divided court,* 420 U.S. 376 (1975), where this Court took the opportunity to consider massive library photocopying, a situation which presented a conflict between the emerging technology of the photocopying industry and the statutory language of the 1909 Copyright Act.

The patent field has also produced a number of occasions in which the applicability of the present Patent Act, 35 U.S.C. §§1 *et seq.*, to new technologies was questioned. In these patent precedents, certiorari was granted to resolve critical issues raised by new technology. For example, in *Gottschalk v. Benson,* 409 U.S. 63 (1972), certiorari was granted to resolve the important question of whether an algorithm for programming general purpose digital computers constituted patentable subject matter under the Patent Act. This Court returned to the computer field in *Parker v. Flook,* 437 U.S. 584 (1980), and *Diamond v. Diehr,* 450 U.S. 175 (1981), and granted certiorari to determine whether industrial processes which included the use of a digital computer could be protected by a patent. And, in *Diamond v. Chakrabarty,* 447 U.S. 303 (1980), certiorari was granted to decide whether a live, man-made microorganism could be patentable under the Patent Act; another recent instance where the language of the Patent Act had to be interpreted to address its applications to new technology.

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5. The striking conflicts between this Court's decision in *Fortnightly* and *Teleprompter*, on the one hand, and the *Sony* decision, on the other, are discussed in detail in Section IV(C), *infra.*

The present case is but another instance in which an important new technology, home VTRs, raises basic legal questions having major business and social impact — whether videotape recording under private, in-home, non-commercial circumstances constitutes copyright infringement and, if so, whether the manufacture, distribution, advertising and/or sale of products embodying this new technology can themselves be acts of infringement.[6] These issues and their ramifications (such as on the long established, but now questioned, home use exception for audio tape recording), are as important and deserving of this Court's prompt attention as were the patentability of computer software and man-made microorganisms, and the potential copyright liability of CATV system operators and library photocopiers.

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6. The conflict presented here is particularly acute when one considers that the constitutional authorization for congressional enactment of the 1976 Copyright Act and the 1909 Copyright Act provides:

> "The Congress shall have power . . . To *promote the progress of science and useful arts* by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" United States Constitution, Art. 1, §8 (emphasis added).

III.

THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE FAILURE OF THE NINTH CIRCUIT TO FOLLOW THIS COURT'S DECISION IN *TELEPROMPTER* AND *FORTNIGHTLY.*

A. The Ninth Circuit decision failed to follow this Court's holding in *Teleprompter* that claims of copyright infringement require an analysis of compensation paid to the copyright proprietor.

In *Teleprompter,* this Court rejected arguments similar to those adopted by the Ninth Circuit in this case and held that CATV systems which carried otherwise unreceivable copyrighted television programming, without the express consent of the copyright proprietors, did not commit copyright infringement. Analysis of the economic impact of the CATV systems' activities upon the television industry and copyright proprietors was pivotal to this Court's decision. The Ninth Circuit (Appendix at 22) expressly rejects as irrelevant all consideration of the economic impact of the sale and use of VTRs on the television industry and copyright owners[7] and, accordingly, is in direct conflict with *Teleprompter.*

As here, the plaintiff in *Teleprompter* urged this Court to adopt a construction of the 1909 Copyright Act which would freeze pre-existing markets in the name of public benefit:

> "We are told that in order to ensure 'the general benefits derived by the public from the

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7. Having rejected consideration of such economic impact, the Ninth Circuit also misapplied the doctrine of fair use, 17 U.S.C. §107, and thus generated a direct conflict with the Court of Claims decision in *Williams & Wilkins.* This Court should also grant certiorari to resolve this conflict.

> labors of authors,' [citations omitted] and 'the incentive to further efforts for the same important objects,' [citations omitted] current licensing relationships must be maintained." *Teleprompter, supra* at 411.

This Court looked beyond these pleas and recognized that scrutiny of the allegedly infringing actions of the CATV system operators in *Teleprompter* could only be conducted in the context of the commercial realities of the television industry. The Court recognized the telling differences between these realities in the television industry and the economic context typically found in copyright infringement actions:

> "In the television industry, however, the commercial relations between the copyright holders and the licensees on the one hand and the viewing public on the other are such that dilution or dislocation of markets does not have the direct economic or copyright significance that this argument ascribes to it. Unlike propagators of other copyrighted material, such as those who sell books, perform live dramatic productions, or project motion pictures to live audiences, holders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material — that is, the television viewers — but by advertisers who use the drawing power of the copyrighted material to promote their goods and services. Such advertisers typically pay the broadcasters a fee for each transmission of an advertisement based on an estimate of the expected number and characteristics of the viewers who will watch the program. While, as members of the

general public, the viewers indirectly pay for the privilege of viewing copyrighted material through increased prices for the goods and services of the advertisers, they are not involved in a direct economic relationship with the copyright holders or their licensees.[13]

[Fn. 13] Some commentators have suggested that if CATV systems must pay license fees for the privilege of retransmitting copyrighted broadcast programs, the CATV subscribers will in effect be paying twice for the privilege of seeing such programs: first through increased prices for the goods and services of the advertisers who pay for the television broadcasts and a second time in the increased cost of the CATV service." *Teleprompter, supra* at 411-412.

In view of the specific compensation which was (and still is) used in the television broadcast industry, this Court refused to be bound by a narrow view of copyright infringement and held that the activities of the CATV system operators were not condemned by the 1909 Copyright Act:

> "By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor. When a broadcaster transmits a program under license from the copyright holder he has no control over the segment of the population which may view the program — the broadcaster cannot beam the program exclusively to the young or to the old, only to women or only

> to men — but rather he gets paid by advertisers on the basis of all viewers who watch the program. The use of CATV does not significantly alter this situation. Instead of basing advertising fees on the number of viewers within the range of direct transmission plus those who may receive 'local signals' via a CATV system, broadcasters whose reception ranges have been extended by means of 'distant signal' CATV rechanneling will merely have a different and larger viewer market." *Teleprompter, supra* at 412.

In *Teleprompter*, the "larger viewer market" comprised the CATV subscribers who could not receive the direct broadcast over the airwaves. Here, the "larger viewer market" are those viewers who cannot, or do not choose to, view a program when originally broadcast and therefore "time shift" by use of a VTR to view it once thereafter, be it an hour, a day or a week later.

In a further parallel, this Court held in *Teleprompter* that the activities of the CATV system operators would financially benefit rather than harm copyright owners and, in any event, were beyond the scope of copyright protection:

> "From the point of view of the broadcasters, such market extension may mark a reallocation of the potential number of viewers each station may reach, a fact of no direct concern under the Copyright Act. From the point of view of the copyright holders, such market changes will mean that the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the CATV market.

> These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation . . . . " *Teleprompter, supra* at 413-414.

The same economic circumstance which mandated a holding of noninfringement by CATV system operators in *Teleprompter* mandates a holding of noninfringement in this action. Just as in *Teleprompter*, use of VTRs for in-home, time shift viewing of copyrighted television programs expands the viewer market and results in increased compensation to broadcasters and copyright owners by increased direct payments from advertisers, and indirectly through increased prices paid by VTR viewers for the products and services of television advertisers.

When the commercial situation here is analyzed in the manner of *Teleprompter*, it becomes apparent, as specifically found in *Teleprompter*, that when a copyright proprietor sells or licenses its work for broadcast, it bargains for compensation based upon the expected number of viewers. The same considerations apply to the price advertisers pay for sponsorship of the broadcast. The owner of the work is paid based on the expected audience; it follows, as found in *Teleprompter*, that the audience has the inherent right to view the broadcast work. The existence of VTRs (or CATV systems) does nothing more or less in the chain of commerce between the copyright owner and the home viewer than increase the potential size of the audience. To the extent that audience size is increased by VTRs (or CATV systems), sellers of broadcast rights and sellers of commercial time slots are compensated by the existing market mechanisms. It matters not to the copyright owner whether a given viewer watches the licensed broadcast at the instant it is broadcast or at a somewhat later

time by use of a VTR. The copyright owner who has sold broadcast rights has no control over whether a given viewer may watch the program; that right "inheres in all members of the public" (*Teleprompter, supra* at 408) whether shifted in *place*, as in *Teleprompter*, or in *time*, as in this case. Since VTRs make no change in the existing commercial arrangement formulated and used by the plaintiffs in this case, except possibly to benefit plaintiffs by increasing their audience and their compensation, their rights are not violated.[8]

Nonetheless, ignoring this Court's holding in *Teleprompter*, the Ninth Circuit held that it was not "necessary to address" the economic impact of VTR sale and use upon the copyright owners in determining "the liability question." (Appendix at 22). Compounding this error, the Ninth Circuit, although considering the crucial issue of economic impact irrelevant to its determination, went on to assume economic harm (contrary to the trial court's express finding of fact) based upon the argument that, since VTR users are willing to pay for VTRs, they ascribe value to their use, and that such value should inure to Universal's benefit (Appendix at 24). Of course, if such a simplistic analysis had been used in *Teleprompter*, it would have led to an erroneous result, since CATV subscribers similarly pay for and ascribe value to the services of CATV systems.[9]

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8. The District Court opinion below found as a matter of fact, undisturbed by the Ninth Circuit, that increased VTR viewership could be measured by existing television rating services, *e.g.*, Nielson and Arbitron, Appendix at 52-54.

9. Indeed, that very argument was inherently rejected in *Teleprompter*. Any "value" claimed by the copyright owner increases audience size to the benefit of the copyright proprietor through the existing television broadcast market mechanism. To the extent that any "value" of broadcast copyrighted works enhances the purchase of VTRs, the copyright owner is compensated fully for such "value" based on the size of the added VTR-user audience.

In specifically rejecting an economic analysis of the copyright owner's position in the television industry when testing whether use of the new VTR technology constituted copyright infringement, the Ninth Circuit violated the guidelines established in *Teleprompter*, and was led to an incorrect and inconsistent decision. Certiorari should be granted in this case to rectify this error.

B. Contrary to the *Sony* decision, this Court held in *Teleprompter* and *Fortnightly* that those who merely aid and abet the viewing of copyrighted broadcast works are not committing copyright infringement.

In both *Teleprompter* and *Fortnightly*, this Court recognized that when examining allegations of copyright infringement in the context of the television industry, the line to be drawn is between broadcaster and viewer; if the accused activity falls on the broadcaster's side of the line, it may be infringement; and if on the viewer's side, it is not. In both *Fortnightly* and *Teleprompter*, the respective plaintiff copyright proprietors urged a simple "but for" test, alleging that since CATV system operators, without license, played a major role, for profit, in the ultimate viewing and hearing of copyrighted broadcast work, they were liable for copyright infringement. This Court rejected that approach:

> "But mere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement — not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed, every television set manufacturer. Rather, *resolution of the issue*

> *before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception.''* *Fortnightly, supra* at 397-398. (Emphasis added.) *See Teleprompter, supra* at 408.

In focusing upon the underlying relationship of CATV to the overall mechanics of television broadcast and viewing, this Court held in *Fortnightly* that notwithstanding the active, and indeed, indispensible functions of CATV, these functions were merely in aid of passive viewers and, accordingly, were not copyright infringement:

> "When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer." *Fortnightly, supra* at 399-400.

In *Teleprompter, supra* at 408, this analysis was reiterated and expanded by the holding that the noninfringing nature of the activities of CATV systems in aiding viewers was not altered by the fact that the broadcast signals carried on the CATV systems were imported from areas far outside the normal reception range of viewers in the community.

In the same manner, VTR manufacturers and distributors merely aid their customers in viewing television signals broadcast on public airwaves, a right which "inheres in all members of the public." *Teleprompter, supra* at 408. Just as in *Teleprompter*, this noninfringing function does not become infringing merely because the use of a VTR permits a broadcast to be viewed at a time (rather than a place) in which it otherwise would be unavailable.[10]

The Ninth Circuit failed to analyze the operative function of VTRs in the overall framework of the television industry, as required by *Teleprompter* and *Fortnightly*. By using a simplistic approach inapplicable to the television industry and to new technology, while rejecting *Teleprompter* and *Fortnightly*, the Ninth Circuit was led astray and reached an erroneous result. This Court should grant certiorari to correct this error.

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10. The Ninth Circuit also committed error in disregarding the substantial uses of VTRs which cannot even allegedly be copyright infringement, *e.g.*, recording of "home movies," recording television broadcasts with consent of the copyright owner, playing prerecorded videotapes, or recording uncopyrighted television broadcasts. Under this Court's decision in *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964), those who merely sell staple articles of commerce suitable for substantial noninfringing uses cannot be held liable for infringment.

CONCLUSION

For the foregoing reasons, Amici respectfully request this Court to grant certiorari:

1. in view of the economic importance of the U.S. VTR industry which is threatened with extinction by the Ninth Circuit decision;

2. to decide important issues relating to the interaction between emerging technology and related statutory provisions; and

3. to correct the Ninth Circuit's error in failing to follow this Court's decisions in *Teleprompter* and *Fortnightly* that (a) claims of copyright infringement in works broadcast by television require an analysis of the full commercial situation, including compensation paid to the copyright proprietor, and (b) those who merely aid and abet the viewing of broadcast works are not copyright infringers.

Respectfully submitted,

MORTON AMSTER
JESSE ROTHSTEIN
AMSTER, ROTHSTEIN &
ENGELBERG
90 Park Avenue
New York, NY 10016
(212) 697-5995

ANTHONY F. LO CICERO
JOEL E. LUTZKER
Of Counsel

Amicus Brief

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No. 81-1687

IN THE

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF HITACHI, LTD. AND HITACHI SALES CORPORATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

MALCOLM GEORGE SMITH,
(Counsel of Record),
CRAIG B. JORGENSEN,
ROBERT H. TAKEUCHI,
JOHN K. HART,
STEVEN P. RICE,
KINDEL & ANDERSON,
555 South Flower Street,
Twenty-Sixth Floor,
Los Angeles, Calif. 90071,
(213) 680-2222,
Attorneys for Hitachi, Ltd. and Hitachi Sales Corporation of America as Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

Assuming *arguendo* that the use of videotape recorders ("VTR's") to record free off-the-air television programming for private home viewing is an infringement of statutory copyright on such programming does the mere manufacture and distribution of VTR's constitute contributory infringement?

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SONY CORPORATION OF AMERICA, *et al.*,

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vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF OF HITACHI, LTD. AND HITACHI SALES CORPORATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Preliminary Statement.

This Brief is submitted by Hitachi, Ltd. ("Hitachi") and Hitachi Sales Corporation of America ("HSCA") as *amicus curiae* in support of the Petition herein that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered in the above-entitled case on October 19, 1981.

As required by Rule 36 of the Rules of this Court, the parties to this action have consented to the filing of briefs *amicus curiae*, which consent is on file with the Clerk of this Court.

Interest of Hitachi, Ltd. and Hitachi Sales Corporation of America.

Hitachi is a Japanese corporation engaged in, among other things, the business of manufacturing VTR's. HSCA is a California corporation engaged in, among other things, the business of distributing Hitachi VTR's in the United States.

Hitachi and HSCA have a vital interest in seeing that this Court reviews the Court of Appeals' decision below for two reasons.

First, as manufacturers and distributors of VTR's, Hitachi and HSCA stand in a similar position to petitioners and will be significantly affected by the outcome of this litigation and the impact which it will inevitably have on the home VTR industry.

Second, Hitachi and HSCA are among the defendants in an action recently brought by respondent Universal City Studios, Inc. in the United States District Court for the Central District of California against 50 manufacturers, distributors, and advertisers of VTR's which together comprise virtually the entire remainder of the home VTR industry. The action, which is entitled "Universal City Studios, Inc., et al. v. RCA, et al.," Civil No. 81-5723 FW, was com-

menced within weeks after the Court of Appeals' decision herein, and in obvious reliance thereon, and states precisely the same causes of action as the instant case. Since the two decisions below currently stand as the only authority considering the question presented, this Court's action on the Petition will have a profound impact upon the outcome of the new litigation.

Hitachi and HSCA accordingly are legitimately interested in petitioners' request that this Court agree to review the Court of Appeals' decision below, which decision, if left undisturbed, creates the specter of unwarranted and far-reaching liability not only for Hitachi and HSCA but for all manufacturers and distributors of VTR's.

Summary of Argument.

In this brief, Hitachi and HSCA demonstrate (1) that the question presented cannot be conclusively answered at the current time because this Court has not ruled on the issue of contributory copyright infringement and because no meaningful guidance may be found in the inconsistent and distinguishable body of authority existing among the lower courts, (2) that, to the extent current copyright case law does contain meaningful precedent as to the question presented, the Court of Appeals misapplied that precedent, (3) that the Court of Appeals' decision is inconsistent with the decisions of this and other courts and with the statutory law on contributory liability in the analogous field of patent law, and (4) that the Court of Appeals' decision is against the public policy favoring lenient judicial treatment of new technologies. For these reasons, this Court should review the decision of the Court of Appeals below.

REASONS FOR GRANTING THE WRIT.

1. Copyright Case Law, Including the Decisions of This Court, Is Currently Inadequate to Answer the Question Presented.

The Court of Appeals and the district court both agreed upon the standard which should be applied in evaluating the contributory liability of the manufacturers and distributors of VTR's. That standard is as follows:

> One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a "contributory" infringer.

Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

Despite the agreement of the lower courts herein, the selection of the *Gershwin* standard is nonetheless troublesome because the standard does not represent the consensus of authority and because it has never before been applied to a factual situation such as that presented herein.

This Court has not addressed the issue of contributory copyright infringement.[1]

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[1] In *Kalem Co. v. Harper Brothers*, 222 U.S. 55, 62-63 (1911), this Court made a fleeting reference to contributory infringement in the context of an early motion picture producer who had converted the novel "Ben Hur" to film. In that case, defendant producer attempted to limit liability for the alleged infringement to the author of the screenplay. The Court held that defendant's contention must be rejected because a motion picture is a "writing" within the meaning of the copyright law. In *dictum* at the conclusion of its opinion, the Court noted that, in any event, the producer would be liable for infringement because he had contributed in bringing the infringing screenplay to the public. Given that the reference to contributory infringement is *dictum*, that copyright law has changed significantly in the intervening seventy years since *Kalem Co.* was decided, and that the case is in no way factually similar to that at issue, this Court should take the opportunity given by the instant case to make a clear pronouncement on the question presented.

The decisions of the circuit and district courts are in a state of disarray.

Although both of the lower courts in this case accepted the general language of *Gershwin* quoted above, that language omits or minimizes the importance of factors which have been applied by other courts.[2]

In many cases, liability for contributory copyright infringement has hinged upon two findings: (1) that the alleged contributory infringer had the right and ability to control and supervise the infringing activity, and (2) that the alleged contributory infringer had a direct financial interest in the infringing activity.[3] The existence of these very facts provided the foundation for the *Gershwin* decision.[4] More significantly, these factors were recognized as the consensus of authority and expressly preserved by the legislative history of the 1976 Copyright Act.[5]

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[2]The variety of factors applied by other courts is well demonstrated by the discussion in 3 Nimmer, *The Law of Copyright* § 12.04(a) (1981).

Many of the factors cited by other courts were briefly discussed in the district court's opinion under the heading "vicarious liability." However, there is no principled way, either factually or legally, of distinguishing the cases emphasizing these other factors from the cases referred to as "contributory infringement" cases, such as *Gershwin*. Indeed, there is a great deal of cross-citation between the two groups of decisions. Furthermore, the Court of Appeals abandoned the distinction in its opinion. There is no purpose to be served by maintaining the distinction here.

[3]*E.g., Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Ass'n.*, 554 F.2d 1213 (1st Cir. 1977); *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963); *KECA Music, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72 (W.D. Mo. 1977); *MCA, Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976), *aff'd in part and modified in part*, 211 U.S.P.Q. 577.

[4]*Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, *supra* at 1162-63.

[5]H. R. Rep. No. 1476, 94th Cong., 2d Sess. 159-60.

In another important group of cases, liability for contributory copyright infringement has been conditioned simply upon the right of supervision and control.[6]

Neither the district court nor the Court of Appeals explained the reasoning behind the selection of the *Gershwin* standard over the standards set forth in other cases. This lack of reasoning in the opinions below is important for a number of reasons.

First, the absence of any reasoning to support the lower courts' selection of the *Gershwin* standard deprives alleged contributory infringers of a clear means by which to judge their potential liability.

Second, the lower courts' analysis of the *Gershwin* standard exacerbates the tension and inconsistencies already existing among the authority. For example, the role of knowledge is now thoroughly confused. Must knowledge of the infringing activity be direct, as suggested by *Gershwin* and by the district court herein, or can it be implied, as suggested by the other cases and by the Court of Appeals herein? Is knowledge a prerequisite to liability, as held by the district court, or does it merely go to damages, as held by the Court of Appeals?[7] This Court should settle this and the other conflicts among the decisions.

Third, and perhaps most important, this case falls into a class of cases which has not been analyzed by the courts under any standard—to wit, cases in which the alleged contributory copyright infringers are the manufacturers and distributors of the mechanical instrumentality which makes the infringing activity possible. The courts have analyzed

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[6]*E. g., Dreamland Ballroom, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929); *Davis v. E. I. duPont de Nemours & Co.*, 240 F. Supp. 612 (S.D.N.Y. 1965).

[7]The role of knowledge in contributory patent infringement is discussed below. *See infra*, at 11.

the situation where the alleged contributory infringer has furnished the direct infringer only with the copyrighted work;[8] the courts have analyzed the situation where the alleged contributory infringer has furnished the direct infringer with both the instrumentality and the copyrighted work;[9] but the courts have not analyzed the situation presented in this case where the alleged contributory infringer furnishes the direct infringer only with the instrumentality itself. Therefore, the Court of Appeals' decision below, in imposing liability upon the manufacturers and distributors of VTR's, takes a step which is unprecedented in the history of copyright law.

Given the absence of either a clear standard or authority to govern the application of any standard to a factual situation such as that at issue and further given the uncertainty which this state of law has created in the opinions below, the guidance of this Court is essential.

2. The Court of Appeals Misapplied the Current Law of Contributory Copyright Infringement, Such as It Is.

To the extent that the Court of Appeals below attempted to make some sense out of the authority described above and apply it to the facts of this case, it did so incorrectly. Under any standard, the manufacturers and distributors of VTR's cannot be held contributorily liable for the copyright infringements of home purchasers and users.

The requirements of the *Gershwin* standard have not been met.

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[8] *See Mount v. Book of the Month Club, Inc.*, 555 F.2d 1108 (2d Cir. 1977).

[9] *See Elektra Records Co. v. Gem Electronic Distributors, Inc.*, 360 F. Supp. 821 (E.D.N.Y. 1973).

Knowledge is missing because, although VTR's can obviously be used to record respondents' copyrighted television programming, they also can be used to record other copyrighted television programming, to record uncopyrighted television programming, for viewing commercially prepared videotapes, and for creating and viewing home videotapes. The manufacturers and distributors of VTR's "know" that all of these uses are possible. However, this is not adequate knowledge to permit a finding of contributory liability.

The mere fact that the manufacturers and distributors of VTR's are links in the economic chain through which individual infringers acquire the instrumentality which they use to infringe is not sufficient to make said manufacturers and distributors liable for contributory infringement. In order for such liability to attach, each sale must be made with the knowledge that the purchaser will infringe a particular copyright or class of copyrights.[10]

Clearly, the manufacturers and distributors of VTR's have no knowledge of the identity of any purchasers and no knowledge of whether or not any unit will be used to infringe any copyrights, including respondents' copyrights. Under the case law, contributory liability cannot be found in such a situation. The mere knowledge that it is possible that *some unknown* infringer may misuse *some unknown* VTR to violate *some unknown* statutory copyright does not render the manufacturers and distributors contributorily liable.

The second element of the *Gershwin* standard—inducing, causing, or materially contributing to an infringing activity—also has not been met. Just as the multiple uses of VTR's and the large economic distance between the manufacturers and distributors, on the one hand, and the pur-

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[10]*See Screen Gems - Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403-4 (S.D.N.Y. 1966).

chasers and users, on the other hand, makes a finding of knowledge unreasonable, these same facts also suggest that the manufacturers and distributors could not have induced, caused or materially contributed to any copyright infringement. The cases in which this second element of the *Gershwin* standard is found typically involve situations where the alleged contributory infringer actively promoted the alleged infringing activity or had the ability to do so.[11]

In this case, although VTR's are advertised, in part, as a means of copying television programming, they are not advertised as a means of copying copyrighted television programming nor as a means of copying respondents' copyrighted television programming. This is not the type of active and specific promotion which is anticipated by the *Gershwin* case and those cases which have followed it. Indeed, it has been held that advertising must be with the knowledge and intent of inducing an infringing activity to justify imposition of contributory liability.[12] As discussed above, knowledge is not present in this case.

The factors which were found determinative of contributory liability in the other authority discussed above are also not present in this case.

The primary factor present in these other cases is the right and ability of the contributory infringer to supervise and control the infringing activity. In this case, the manufacturers and distributors of VTR's have neither the right nor the ability, actual or potential, to supervise the home use of VTR's.

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[11]*See Gershwin Publishing Corp. v. Columbia Artists Management, Inc., supra.*

[12]*E.g., Screen Gems - Columbia Music, Inc. v. Mark-Fi Records, Inc., supra.*

The special factor of direct financial interest which has been found persuasive in certain cases is also not applicable here. The direct financial interest of manufacturers and distributors of VTR's is limited to the purchase price of their product. The manufacturers and distributors of VTR's profit directly only from the sale of VTR's and not from the use of VTR's—whether the use is to copy respondents' programming, to copy other copyrighted programming, to copy uncopyrighted programming, or to display commercially prepared or home videotapes.

The district court herein recognized the validity of the foregoing analysis. The Court of Appeals rejected it without the support of authority or logic. This Court should correct the Court of Appeals' error.

3. The Court of Appeals Misapplied the Law of Contributory Patent Infringement.

Finding little helpful in the area of copyright law, both the district court and the Court of Appeals turned to patent law for assistance.

The subject of contributory patent infringement is dealt with directly in the language of the federal patent statute. 35 U.S.C. § 271 provides, in subsection (c), that liability for contributory patent infringement may be imposed against:

> Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

Both of the lower courts herein devoted their attention solely to that portion of subsection (c) which exempts the sale of a staple article of commerce "suitable for substantial non-infringing use."

Such a limited treatment of the statute is misleading because the drafters of the patent law, in their wisdom, created a concept which operates to limit or preclude a finding of contributory infringement in certain situations. This concept is known as "patent misuse." *See* 35 U.S.C. § 271(d). To the extent that it is deemed desirable to analogize copyright law to patent law at least in the area of contributory infringement, it would be advisable not to incorporate that law piecemeal but rather to incorporate it fully. If the incorporation is complete, the question presented is not so simply answered as the lower courts have suggested.

Basically, patent misuse consists of an inventor's attempt to link a protected product with an unprotected product by, for example, tying the purchase of the two products together.[13]

If, in this case, a concept of "copyright misuse" is applied, respondents should have very little success. Their lawsuit should be viewed as an attempt to link a protected property (their copyrighted television programming) with an unprotected activity (the use of VTR's generally). This linkage is an impermissible attempt to extend respondents' copyright monopoly.

Aside from the issue of whether or not the doctrine of "patent misuse" should be incorporated into the copyright law, it remains that the Court of Appeals misapplied the doctrine of contributory infringement as it has been set forth in the case law interpreting Section 271(c).

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[13]*See, e.g., Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980).

First, the Court of Appeals overruled the district court's conclusion that VTR's are a staple article of commerce "suitable for substantial noninfringing use." This was reversible error.

The determination of whether or not the cited exception to contributory liability applies is one of fact, not law.[14] Factual determinations are reserved to the trier of fact, in this case the district court, and all subsequent review must generally be bound by its findings. In this case, no exception to this rule was invoked by the Court of Appeals.

Moreover, even if the question did involve legal judgment, the Court of Appeals' conclusion that VTR's are not staple articles of commerce "suitable for substantial noninfringing use" is clearly wrong. VTR's are a product which may currently be found in three million American homes. The uses of VTR's are equally broad—VTR's may be used for copying copyrighted and uncopyrighted television programming, for displaying commercially prepared videotapes, and as a tool for the creation and display of home videotapes. Each of the uses are "substantial uses" and this lawsuit implicates but a portion of one of them. Therefore, even without the district court's binding finding of fact, common sense dictates that the statutory exemption applies to preclude the imposition of liability upon the manufacturers and distributors of VTR's for the infringing activities of home purchasers and users.

Second, the Court of Appeals incorrectly held that lack of knowledge does not relieve the manufacturers and distributors of VTR's from liability but only affects the remedies available against them.

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[14] *See Charles H. Lilly Co. v. I. F. Laucks, Inc.*, 68 F.2d 175 (9th Cir. 1933), *cert. denied*, 293 U.S. 573.

Although this Court has not yet ruled upon the role of knowledge in the context of contributory liability for copyright infringement, it has clearly decided the issue in patent law. This Court has held that knowledge of three facts is an essential prerequisite to a finding of liability for contributory patent infringement. The alleged contributory infringer must know, first, that his product was especially designed for use in an infringing activity and was not suitable for other use, second, that the patented product was in fact patented, and, third, that any use of his product would be infringing. *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488 (1964).

In this case, previous discussion has indicated that the manufacturers and distributors of VTR's do not have sufficient knowledge to justify liability.

Significantly, in *Aro Manufacturing*, this Court further noted that the issue of knowledge is one of fact, and not of law. *Id.* at 491. This gives increased significance to the district court's express finding of fact that the manufacturers and distributors of VTR's have insufficient knowledge of the infringing use of their products and requires that the Court of Appeals' contrary statement be reversed.

The Court of Appeals' extensive misapplication of the law of contributory patent infringement should lead this Court to accept this case for review.

4. The Court of Appeals' Decision Is Against the Public Policy Favoring New Technologies.

Aside from the legal issues discussed above, a broad issue of public policy is involved in this case. Specifically, this case implicates the public policy favoring new technologies. The Court of Appeals ignored this policy by failing to consider the impact which its decision would have upon the new technology of VTR's.

This policy has been recognized in the field of patent law.[15] The Court seeks to do nothing which will "block the wheels of commerce."[16]

The market for and use of VTR's has not yet stabilized. As mentioned hereinabove, VTR's are adaptable to a wide variety of uses. They may be used to record both copyrighted and uncopyrighted television programming, they may be used for the display of videotapes which have been commercially prepared with the permission of the copyright owners, and they may be used for the creation and display of home videotapes. It is quite possible, and perhaps even probable, that the ultimate use of this technology will be in areas quite apart from the one current use which implicates copyright law in any way.

That this may well be the case can be seen from the development of another technology which was once thought to have significant copyright impact. Photocopying and xerography machines, when they first were introduced, were viewed as devices which could be used primarily only for the unlawful reproduction of copyrighted materials. In fact, the use of that technology for unlawful purposes has steadily declined, both by virtue of changes in case and statutory law and changes in use, so that at the current time only a very small percentage of the use of such devices is deemed wrongful.[17]

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[15]*See Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 361 (1961) (Black, J., concurring), *reh'g denied*, 365 U.S. 890.

[16]*Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912), *overruled on other grounds* by *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917).

[17]*See Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1975), *aff'd by an equally divided court*, 420 U.S. 376.

The Court of Appeals' holding in this case, if left undisturbed, will undoubtedly have a significant chilling effect upon the nascent home VTR industry before the technology has a chance to find its niche in our society.

Conclusion.

For each and all of the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals below.

Dated: May 3, 1982.

Respectfully submitted,

MALCOLM GEORGE SMITH,
(Counsel of Record),
CRAIG B. JORGENSEN,
ROBERT H. TAKEUCHI,
JOHN K. HART,
STEVEN P. RICE,
Attorneys for Hitachi, Ltd. and Hitachi Sales Corporation of America as Amicus Curiae.

Amicus Brief

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No. 81-1687

In The

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. AND WALT DISNEY PRODUCTIONS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF McCANN-ERICKSON, INC., BATTEN, BARTON, DURSTINE & OSBORN, INC., BACKER & SPIELVOGEL, INC., WARING & LAROSA, INC., AND AMMIRATI & PURIS INC., *AMICI CURIAE*

JOHN A. DONOVAN
(Counsel of Record)
A. HOWARD MATZ
JOHN J. KRALIK IV
HUGHES HUBBARD & REED
555 South Flower Street
Los Angeles, California 90071
(213) 489-5140
Attorneys for Amici Curiae
McCANN-ERICKSON, INC.,
BATTEN, BARTON, DURSTINE,
& OSBORN, INC.,
BACKER & SPIELVOGEL, INC.,
WARING & LAROSA, INC., and
AMMIRATI & PURIS INC.

Of Counsel:
LEO A. EGAN
BARRY J. WAGNER
PHILIP S. REISS
RAYMOND W. MERRITT

April 20, 1982

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BRIEF OF McCANN-ERICKSON, INC., BATTEN, BARTON, DURSTINE & OSBORN, INC., BACKER & SPIELVOGEL, INC., WARING & LAROSA, INC., AND AMMIRATI & PURIS INC., *AMICI CURIAE*

This brief is submitted with the written consent of all parties on file with the Clerk of this Court.

McCann-Erickson, Inc. ("McCann"), Batten, Barton, Durstine & Osborn, Inc. ("BBDO"), Backer & Spielvogel, Inc. ("Backer"), WARING & LAROSA, INC. ("Waring"), and Ammirati & Puris Inc. ("Ammirati"), as *amici curiae,* respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.[1]

1. For the sake of clarity, in this brief McCann, BBDO, Backer, Waring and Ammirati will adopt the abbreviations utilized in Sony's petition.

INTEREST OF THE AMICI CURIAE

McCann, BBDO, Backer, Waring and Ammirati are advertising agencies. McCann serves as the national advertising agency for the Betamax and other Sony-manufactured products. It succeeded DDBI on the Betamax account. In addition, McCann was the advertising agency for Hitachi Sales Corporation of America, which also markets videotape recorders ("VTRs") and related items including videotape cassettes. Backer handles the national advertising for the Betamax SL 2000 model, which has a portable recorder that (like a home movie camera) can tape non-broadcast material, such as family celebrations. Waring prepares the advertising for videotape used on VTRs. Ammirati handles the advertising for Betamax equipment used for commercial and educational purposes. BBDO does not serve as the advertising agency for any Sony products, but it is the agency for General Electric's VTR and related equipment.

McCann, BBDO, Backer, Waring and Ammirati have a direct interest in the outcome of this litigation. They may be exposed to contributory infringement liability for their involvement in advertising campaigns for VTRs. Indeed, within weeks after the Ninth Circuit's opinion, respondent Universal sued McCann, BBDO and 13 other advertising agencies for copyright infringement. *Universal City Studios, Inc. v. RCA Corporation,* No. 81-5723-FW (C.D. Cal., filed Nov. 6, 1981). That complaint accuses the agencies of having

> "published and * * * broadcast * * * advertisements and brochures * * * for the purpose of selling one or more brands of the VTR's and video-cassettes * * * for use by members of the public in making recordings and copies of [materials] owned and copyrighted by plaintiff."

McCann, BBDO, Backer, Waring and Ammirati also believe that the chilling effect of the Ninth Circuit's contributory infringement rule will impede the conduct of

their business. In the highly competitive advertising industry, agencies must seek new clients and promote newly developed products such as the Betamax. Under the Ninth Circuit's rule, taking on new products that are capable of some infringing use would expose an agency to the risk of enormous secondary liability.

SUMMARY OF ARGUMENT

1. The Ninth Circuit's ruling has vastly extended the scope of contributory infringement liability. This sweeping extension puts the Ninth Circuit in direct conflict with the Second Circuit, which in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 & n.8 (2d Cir. 1971), concluded that a mere "quantitative" contribution to an infringement is an insufficient predicate for liability in light of *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 396-98 (1968). Moreover, since it based its determination of whether the Betamax fits within the staple-article-of-commerce exception upon a "primary use" rather than a "sole use" test, the Ninth Circuit's ruling is also in conflict with this Court's ruling in *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 213 (1980) (contributory patent infringement).

2. Without weighing the constitutional implications, the Ninth Circuit has adopted an overly inclusive rule of contributory infringement which would have a chilling effect upon commercial speech and upon invention. It has imposed liability on an advertising agency for merely being associated with the marketing of a product capable of non-infringing use, even though the agency could not prevent infringing use and the advertising did not induce the infringing conduct. Such an open-ended rule can only make agencies reluctant to undertake the advertising of such products and inhibit the creators of such products from fully exploiting their inventions.

3. The legislative history of the Copyright Act of 1976, 17 U.S.C. §§ 101-810, (the "1976 Act") makes clear that home-use videotape recording is non-infringing conduct within the ambit of the "fair use" doctrine developed under the prior copyright statute and continued under the 1976 Act. The Ninth Circuit erroneously reached a contrary conclusion because it reviewed the legislative history solely in search of an express exemption for home-use recording, which was unnecessary, and it failed to consider the pertinent legislative history in connection with the fair-use doctrine, the context in which that history was applicable.

ARGUMENT

I.

THE NINTH CIRCUIT'S EXPANSION OF CONTRIBUTORY INFRINGEMENT LIABILITY PRESENTS A CONFLICT BETWEEN CIRCUITS AND WITH THIS COURT'S PRIOR RULINGS

By holding Sony's advertising agency liable for merely advertising a product whose "primary" use was recording television programs, the Ninth Circuit expanded contributory infringement liability far beyond any previous decision.[2] Since the trial record demonstrated

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2. We have found only three cases holding advertising agencies liable for copyright infringement. In each, the agency was directly involved in the actual infringement. *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 327 F. Supp. 788, 791-92 (S.D.N.Y.), *remanded on other grounds, Screen Gems-Columbia Music, Inc. v. Mellis & Lebow Corp.*, 453 F.2d 552 (2d Cir. 1971) (agency knowingly participated in packaging and selling pirated recordings and dealing directly with the customers); *Davis v. E. I. DuPont de Nemours & Co.*, 240 F. Supp. 612, 631-32 (S.D.N.Y. 1965) (agency participated in, and had power to supervise, the writing of a television script that infringed copyrighted play); *Robertson v. Batten, Barton, Durstine & Osborn, Inc.*, 146 F. Supp. 795, 797 (S.D. Cal. 1956) (agency created a commercial jingle incorporating a copyrighted hit song and performed it after infringement notice).

In the patent context, mere advertisement of an infringing article does not constitute infringement. *Ling-Temco-Vought, Inc. v. Kollsman Instrument*

that the advertising "did not cause or induce" the infringing conduct, Pet. App. at 93-94, DDBI's only offense was to be, in the Ninth Circuit's view, "sufficiently engaged in the enterprise [of marketing the Betamax] to be held accountable," Pet. App. at 27. This open-ended rule is in direct conflict with decisions of the Second Circuit, and it also conflicts with decisions of this Court in the closely related area of contributory patent infringement.

None of the technology involved in this case existed when this Court last spoke to the issue of contributory copyright infringement in *Kalem Co. v. Harper Brothers,* 222 U.S. 55 (1911), where the infringing conduct was tantamount to direct infringement.[3] We respectfully submit that there is now an urgent need for this Court to clarify this important area and resolve the existing conflict in the decisions.

A. The Ninth Circuit's Rule Conflicts With That Of The Second Circuit

Both the district court and the Ninth Circuit commenced their analyses of contributory infringement by reference to the following articulation of the rule by the Second Circuit in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.,* 443 F.2d 1159, 1162 (2d Cir. 1971):

> "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."

While the *Gershwin* test appears quite broad, the Second Circuit limited it in a way not noted by the Ninth Circuit. In a footnote, the Second Circuit selectively quoted from this Court's decision in *Fortnightly Corp. v.*

Corp., 372 F.2d 263, 270 (2d Cir. 1967), *citing Knapp-Monarch Co. v. Casco Products Corp.*, 342 F.2d 622, 626 (7th Cir. 1965).

3. By contrast, this Court has during the same period considered the scope of the contributory patent infringement doctrine ten times. *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187-97, 216-20 (1980).

United Artists Television Corp., 392 U.S. 390, 396-97 (1968), as follows:

> "8. See Fortnightly Corp. v. United Artists Television, Inc., * * * in which the Court explained that 'mere quantitative contribution cannot be the proper test to determine copyright liability * * * Rather, resolution of the issue * * * depends upon a determination of the function that [the alleged infringer] plays in the total [reproduction] process. * * *' " (443 F.2d at 1162 n.8.)

Thus, the Second Circuit would not impose contributory infringement liability on a party with a purely "quantitative" role, like the advertising agency in the present case, because that would conflict with this Court's dicta in *Fortnightly*. Professor Nimmer is in accord. 3 M. Nimmer, *Nimmer On Copyright* § 12.04(A) at 12-38 n.22 (1981) (hereinafter "Nimmer").

Patently, the Ninth Circuit's finding of contributory infringement in the present case is diametrically opposed to the Second Circuit's carefully circumscribed rule. Moreover, the Ninth Circuit's ruling brings to reality the nightmarish dangers of "quantitative" analysis which this Court foresaw in *Fortnightly*:

> "[M]ere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement — not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and indeed, every television set manufacturer." (392 U.S. at 397.)

So too here, a rule that makes Sony's advertising agency liable on these facts can just as easily be applied to the manufacturers who sell Betamax components to Sony or

the television networks who broadcast copyrighted shows with knowledge that there are three million VTRs in use in the United States and who count those VTR owners in their audience calculations when selling commercial time to sponsors.[4]

B. The Ninth Circuit's "Staple-Article-Of-Commerce" Ruling Conflicts With This Court's Decisions

Recognizing that the Betamax still has substantial non-infringing uses even if home-use recording were viewed as infringement, the district court held that the marketing of this device was not contributory infringement by analogy to the staple-article-of-commerce doctrine in patent law.[5] Reversing this determination, the Ninth Circuit ruled that the Betamax was not a staple article because it is "sold for the *primary purpose* of reproducing television programming," most of which is copyrighted.[6] This is, however, a complete evisceration of the "staple-article" doctrine.

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4. So long as VTR users are counted in the potential audience for license fee negotiation purposes, the copyright owner is benefitted, not harmed. *See* Pet. App. at 110. *See also* Pet. App. at 53; Nimmer § 13.05[F], at 13-97.

5. That doctrine is codified at 35 U.S.C. § 271(c) which provides:

> "(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, *knowing the same to be especially made* or especially adapted *for use in an infringement* of such patent, *and not a staple article or commodity of commerce suitable for substantial noninfringing use*, shall be liable as a contributory infringer." (Emphasis added.)

6. Pet. App. at 25-26 (emphasis added). Even under this view, of course, there remains a great deal of programming which can be recorded without infringement or objection (Sony Petition at 4-5 & nn.3-4; Pet. App. at 97), and there are other substantial non-infringing uses of VTRs (*e.g.*, home-videotaping of family events or playback of purchased or rented cassettes). *See* Pet. App. at 41. A consumer can thus acquire and enjoy a Betamax without engaging in conduct that the Ninth Circuit would view as infringing.

As this Court has made clear, the test for a nonstaple article is whether it is "capable *only* of infringing use," not whether its *primary* use is infringing. *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 213 (1980) (emphasis added). There is an enormous difference.[7]

The Ninth Circuit's "primary purpose" test also conflicts with the only other decision to apply the staple-article doctrine in a copyright case, *Midway Manufacturing Co. v. Arctic International, Inc.*, 211 U.S.P.Q. 1152 (N.D. Ill. 1981). That court, following the *Dawson* approach, declined to enjoin preliminarily the manufacture and sale of speed-up devices for use on video games. It held a trial was required to determine whether the devices were designed "*solely* to modify" plaintiff's copyrighted games or were usable on a variety of games. *Id.* at 1159 (emphasis added).

This Court should remedy the Ninth Circuit's distortion of the principles of contributory infringement in general, and the staple-article-of-commerce doctrine in particular, by granting review in this case.

II.

THE NINTH CIRCUIT'S OVERLY INCLUSIVE VIEW OF CONTRIBUTORY INFRINGEMENT WOULD HAVE A CHILLING EFFECT UPON SPEECH AND INVENTION

Unless overturned by this Court, the overly inclusive view of contributory infringement adopted by the Ninth Circuit in this case will have a chilling effect upon commercial speech and invention.

From the perspective of an advertising agency the chilling effect flows from the imposition of liability

7. For example, in the case of a recording device that is used for copyright infringement 51% of the time, the Ninth Circuit rule would give the owner of the copyright to a single episode of "The Mickey Mouse Club" the power to suppress this technology completely, precluding exploitation of the other 49% of its uses.

upon an agency for doing nothing more than advertising a product which, even if the Ninth Circuit's view of home use were correct, is capable of both infringing and substantial non-infringing use. In the case of DDBI, moreover, this liability was imposed notwithstanding a record which demonstrated that (1) neither the agency nor its client had *any* power whatsoever to control the decisions of individual Betamax owners as to engaging in "infringing" uses, and (2) the advertising did not induce the making of the allegedly infringing copies. Pet. App. at 93-97.

The most prudent reaction to such contourless rules of liability is for an agency to eschew involvement with any product which is capable of some infringing use. Yet this is the type of excessive self-censorship or chilling effect which this Court has taken great pains to prevent.[8] While the facile reply may be that such advertising is purely commercial speech, and thus entitled to lesser protection, there is far more to it than that. As this Court said in *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-64 (1977):

> "[Commercial] speech should not be withdrawn from protection merely because it proposed a mundane commercial transaction. * * * The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. * * * And commercial speech serves to inform the public of the availability, nature and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. * * * In short, such speech serves individual and

8. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) ("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.").

societal interests in assuring informed and reliable decisionmaking. * * *"[9]

If overly inclusive rules of contributory infringement liability make agencies reluctant to become involved with products capable of potentially infringing uses, then the societal interest in the free flow of commercial information will be impaired. Certainly, commercial speech may be regulated, but any such regulation must be undertaken "with care and in a manner no more extensive than reasonably necessary to further substantial interests." *In re R.M.J.*, 50 U.S.L.W. 4185, 4190 (U.S. Jan. 25, 1982).[10] This the Ninth Circuit has not done. Rather, it has imposed liability in such a way as to preclude advertising of even the substantial, concededly non-infringing uses of the Betamax, without considering the first amendment implications of its ruling.

The chilling effect of the Ninth Circuit's ruling extends far beyond the impact upon advertising agencies and commercial speech. It has a similar impact upon invention. Thus, the inventor and manufacturer of the Betamax is being prevented from exploiting its non-infringing uses. Moreover, given the contributory infringement liability imposed upon all links in the manufacture and distribution chain of the Betamax, we must anticipate that the inventor of the next technological innovation of this type will face significantly increased barriers in attempting to convince a manufacturer, distributor or retailer to take on the new product. Higher

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9. *Accord, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 761-65 (1976).

10. *Accord, Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 91 (1977) (labeling speech "commercial" does not permit a court to escape the task of weighing the first amendment interest against the interest underlying the regulation). While it might be constitutionally permissible to prohibit advertising that causes or induces infringement, or even to require that a warning against infringement be included in any advertisement, the Ninth Circuit has gone too far by adopting a rule that effectively silences all advertising of the product.

barriers will hamper the exploitation of such inventions and, to that extent, defeat the societal goal of encouraging invention.[11]

Even if some home uses of videotape recorders were held to be direct infringement, contributory infringement liability must be limited to conduct which knowingly induces the infringement, not just makes it possible, if compromise of the public interests in the free flow of commercial speech and the encouragement of invention is to be avoided.

III.

THE NINTH CIRCUIT ERRONEOUSLY FAILED TO CREDIT THE LEGISLATIVE HISTORY SHOWING THAT CONGRESS VIEWED HOME-USE RECORDING AS FAIR USE

The Ninth Circuit analyzed the legislative history of the 1976 Act out of context, failing to recognize that Congress viewed home-use videotape recording as non-infringing conduct within the "fair use" doctrine developed by the courts under the Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909) (the "1909 Act"), and continued under the 1976 Act.

A. Since Home Use Is Fair Use No Express Exception Is Necessary

The Ninth Circuit's consideration of the legislative history of the 1976 Act was undertaken out of context. It analyzed the legislative history to test the

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11. The primary purpose of patent and copyright protection is the promotion of the "Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8. *See* Register of Copyrights, 86th Cong., 1st Sess., *Report on the General Revision of the U.S. Copyright Law* 5 (Comm. Print 1961) (hereinafter, "1961 Report"). Reward to patent and copyright owners is a secondary consideration. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954). By its vast extension of contributory infringement, the Ninth Circuit is promoting the exclusive rights of "Authors" to the detriment of the rights of "Inventors" and of "Progress" in the "useful Arts."

proposition that there was an implied statutory exemption *"apart from the fair use doctrine."* Pet. App. at 11 n.8 (the court's emphasis). [12] Then, when it considered fair use, the Ninth Circuit concluded that home-use recording did not fall within the statutory continuation of this doctrine, 17 U.S.C. § 107, without ever connecting section 107 to the statements in the legislative history that applied the fair-use doctrine to home-use recording. *See* Pet. App. at 12-25.

In its consideration of the interplay between the statutory language and the legislative history relied upon by the district court, the Ninth Circuit applied three maxims of statutory construction.[13] First, it applied *expressio unius est exclusio alterius* in ruling that the express exceptions in sections 107-118 of the 1976 Act are exclusive, thereby precluding an implied exception for home-use recording. Pet. App. at 4-12. This approach fails to appreciate that no separate exception is necessary because the 1976 Act expressly continued the doctrine of fair use, which covers home-use recordings.[14] Since there is a statutory exception covering home use, the maxim is inapplicable. As the court in *Encyclopedia Britannica*

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12. *See also* Pet. App. at 14 ("It is interesting to note that appellees have not suggested that home video recording would not violate the Old Act in the absence of a finding of fair use.").

13. It was error to apply the maxims rather than credit the legislative history before the court. As this Court has repeatedly held, maxims of statutory construction serve "only as an aid in discovering the legislative intent when that is not otherwise manifest," *United States v. Barnes*, 222 U.S. 513, 519 (1912), and they "must yield to clear contrary evidence of legislative intent." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). *Accord, Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940).

14. A major function of the fair-use doctrine has been to provide a flexible tool for adapting the statutory scheme of copyright protection to technological innovations such as the VTR. This function was singled out by Congress when it continued the doctrine under the 1976 Act, as follows: "[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. • • • [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659, 5680 (hereinafter the "1976 House Report").

Educational Corp. v. Crooks, 447 F. Supp. 243 (W.D.N.Y. 1978), put it:

> "The legislative history * * * makes clear that the statutory exemptions were intended to supplement rather than supersede the doctrine of fair use * * *. Therefore, one cannot infer that a use is prohibited merely because it was not exempted by the statute." (*Id.* at 249 n.7.)

Moreover, the Ninth Circuit's maxim proves too much. Were it as categorical as that court believed, it would have precluded the development of the doctrine of fair use as well as the specific application of that doctrine to home-use taping of sound recordings. Thus, on its face the 1909 Act granted copyright holders a complete monopoly "to print, reprint, publish, copy and vend the copyrighted work." 1909 Act § 1(a). Notwithstanding this absolute language, the courts developed the doctrine of fair use which, in the Ninth Circuit's own words, was designed "to immunize some forms of copying from the literal implications of the [1909] Act." Pet. App. at 5. And, as is discussed below, it was a specific application of this principle that was the predicate for Congress' conclusion that home-use taping of sound recordings is not infringing conduct.[15] See pp. 15-18, *infra.*

The second maxim on which the Ninth Circuit relied was that "[r]esort to the legislative history of an Act is entirely unnecessary when the statute is clear and unequivocal on its face." Pet. App. at 12. This Court, however, has repeatedly held that such perceived clarity cannot justify a refusal to examine the legislative history. *Train v. Colorado Public Research Group,* 426 U.S. 1, 9-10 (1976) (exclusion of legislativ history held clearly

15. The Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (hereinafter the "1971 Amendment") contained a similar, apparently "exclusive" right to "reproduce" sound recordings. *Id.* § 1(f). Nevertheless, as shown *infra,* p. 17, the fair-use doctrine takes home audio recordings out of the provisions of that statute.

erroneous, even though the statute appeared clear on its face); *see United States v. Clark,* 50 U.S.L.W. 4128, 4129 (U.S. Jan. 12, 1982). In any event, this maxim is clearly inapplicable because the legislative history in question relates to the fair-use exception, a provision which the Ninth Circuit certainly does not view as clear and unambiguous. *See* Pet. App. at 14.

Finally, opining that "[t]here is absolutely nothing in the 1971 legislation which would indicate that the Congress was in any way concerning itself with home video recording," the Ninth Circuit found no basis for a home-use exemption since "silence cannot be viewed as an expression of Congressional intent." Pet. App. at 12. That Congress did not remain silent on the specific subject of home video recording will be demonstrated in the following section. Beyond that, the maxim is in any event inapplicable because Congress made express provision for fair use, and the legislative history demonstrates that Congress viewed home recording as falling within that doctrine.

B. The 20-Year Legislative History Of The 1976 Act Shows That Home Use Was Viewed As Fair Use

To the extent that the Ninth Circuit gave any consideration to the legislative history, it clearly missed its thrust. It chose to view the 1971 Amendment as an isolated occurrence and "entirely beside the point," Pet. App. at 11, rather than as an integral part of a 20-year continuum of legislative work on a general revision of the copyright laws. Properly viewed in the latter perspective, it is apparent that the legislative history of the 1971 Amendment is relevant. The home-use exception for sound recordings contained in that history is a concrete application of Congress' more general view that home use falls within the doctrine of fair use.

1. *The Legislative History Was A Single Continuum*

Where, as here, the passage of a statute is the culmination of a prolonged period of legislative

consideration of a succession of bills on the same subject matter, it is entirely appropriate to interpret the final product in light of the full history of the legislative process which produced it. This Court emphasized this principle in *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980), where it construed statutes governing contributory infringement of patents:

> "Although the final version of the statute reflects some minor changes from earlier drafts, the essence of the legislation remained constant. References were made in the later hearings to testimony in the earlier ones. Accordingly, we regard each set of hearings as relevant to a full understanding of the final legislative product." (*Id.* at 204.)[16]

The 1976 Act was the product of 20 years of congressional study. It commenced in 1955 with a congressional direction to the Copyright Office to undertake a general revision of the copyright law and included the introduction of seven successive sets of similar bills. 1976 House Report at 47-49. The 1971 Amendment was not an independent event but rather an integral part of this continuum. In 1971, the general revision act had stalled in Congress. Since record piracy was reaching epidemic proportions in the absence of protection for sound recordings, Congress enacted a bill establishing the limited sound-recording copyright, which had been a perennial feature of the general revision bills. The legislative history of the 1971 Amendment shows that Congress intended that when the general revision was enacted, the 1971 Amendment would be reincorporated into the general statute,[17] and this eventually occurred.

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16. *Accord, Baldridge v. Shapiro*, 50 U.S.L.W. 4227, 4230 n.10 (U.S. Feb. 24, 1982) (statutory interpretation based on 18 years of legislative history leading to the Freedom of Information Act); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 178 (1978).

17. The Chairman of the House Judiciary Committee stated:

> "[N]either the limited copyright for sound recordings nor the increase in remedies for owners of musical compositions is a new expedient. Both have been approved by our committee and passed by the House as part of

2. *Home-Use Was Consistently Viewed As Fair Use*

A review of the entire 20-year continuum of the legislative history discloses that Congress and the experts it relied upon consistently viewed home use as falling within the protection of the doctrine of fair use. This is apparent from the beginning of the copyright revision process. In 1955, Congress allocated funds for comprehensive studies of the major issues of copyright revision. 1976 House Report at 47. Alan Latman, the scholar assigned to examine the doctrine of fair use, found that personal and private use was generally considered to be outside the scope of copyright liability:

> "The defense of fair use has been raised most frequently in certain contexts. The more characteristic situations will be examined. * * *
>
> * * * *
>
> 5. *Personal or private use*
>
> Although the case law is apparently silent on the point, at least one writer has concluded that 'anyone may copy copyrighted materials for the purposes of private study or review.' It has, moreover, been vigorously argued that 'private use is completely outside the scope and intent of restriction by copyright. * * *' "[18]

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* * * the copyright law revision bill of 1967, and both would almost certainly have been enacted into law ere now, had that not been held up pending Senate action on the revision."

Hearings on S. 646 and H.R. 6927 Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 1st Sess. 5 (1971) (hereinafter "1971 Hearings"). *Accord*, H.R. Rep. 92-487, 92d Cong., 1st Sess. 3-4 (1971) (hereinafter "1971 House Report"). The Librarian of Congress told the Senate Judiciary Committee:

> "[The] problem of record piracy is too urgent to await comprehensive action on copyright law revision, and [the 1971 Amendment is] badly needed now. Upon enactment of the revision bill, [it] would, of course, be merged into the larger pattern of the revised statute as a whole." (*Id.* at 10.)

18. A. Latman, Studies Prepared for the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary of the United States Senate, 86th Cong., 2d Sess., Study 14, *Fair Use of Copyrighted Works*, 7, 11-12 (Comm. Print 1960) (footnotes omitted).

Similarly, the 1961 Report to Congress of the Register of Copyrights accurately predicted the development of the Betamax and opined that its home use would not be infringement:

> "New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright."[19]

In 1971 Barbara Ringer, then the Assistant Register of Copyrights,[20] testified before the House Judiciary Committee, directing her remarks to home audio *and videotape* recording:

> Mr. Beister. "* * * My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set.
>
> "* * * [T]his legislation, of course, would not point to his activities, would it?
>
> Miss Ringer. "I think the answer is clearly, 'No, it would not.' " (1971 Hearings at 22.)

Miss Ringer then went on to make the following observations on *video* cassette recording:

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19. 1961 Report at 30.

20. The Ninth Circuit denigrated the statements of Miss Ringer and Rep. Kastenmeier (pp. 16-18, *infra*) terming them "extemporaneous" and not "a considered review of the home videorecording problem." Pet. App. at 11 & n.8. The facts are, however, that Miss Ringer was the Assistant Register (and later the Register) of Copyrights, an expert in the field who had spent years studying the problem at Congress' behest, and that Rep. Kastenmeier was the Chairman of the subcommittee which handled both the 1971 Amendment and the 1976 Act. Their views could hardly have been more considered, and the Ninth Circuit erred in failing to treat them as authoritative. As this Court stated recently "[w]e necessarily attach 'great weight' to agency representations to Congress when the administrators 'participated in drafting and directly made known their views to Congress in committee hearings.' " *United States v. Vogel Fertilizer Co.*, 50 U.S.L.W. 4137, 4142 (U.S. Jan. 13, 1982). *Accord, Zuber v. Allen*, 396 U.S. 168, 192 (1969). Likewise this Court has held that statements by committee chairmen and sponsors of a bill are entitled to similar great weight. *Simpson v. United States*, 435 U.S. 6, 13 (1978). *See also* cases cited in Pet. App. at 62 n.1.

"I have spoken at a couple of seminars on video cassettes lately, and this question is usually asked: 'what about the home recorder?'

"The answer I have given and will give again is that this is *something you cannot control.*

"You simply cannot control it.

"* * * I do not see anybody going into anybody's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping."[21]

It was in this context, then, that the final House Report on the 1971 Amendment declared it to be the intent of Congress that home-use taping of sound recordings would not be infringement:

"Home Recording

"In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright *not grant any broader rights than are accorded to other copyright proprietors under the existing Title 17.* Specifically, it is not the intention of the Committee to restrain the *home recording, from broadcasts* or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." (1971 House Report at 7 (emphasis added).)

Explanatory remarks of Representative Kastenmeier on the House floor just prior to passage of the 1971 Amendment also show that the House Report meant that home use should be fair use:

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21. 1971 Hearings at 22-23 (emphasis added); *see also* statement of Stanley M. Gortikov, President of the Record Industry Association of America, Inc., *id.* at 26.

MR. KAZEN: "Am I correct in assuming that the bill protects copyrighted material that is duplicated *for commercial purposes only?*

MR. KASTENMEIER: "Yes.

MR. KAZEN: "In other words, if your child were to record off of a program which comes through the air on the radio or *television,* and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?

MR. KASTENMEIER: "This is not included in the bill. I am glad the gentleman raises the point.

"On page 7 of the report, under 'Home Recordings,' Members will note that under the bill the same practice which prevails today is called for; namely, *this is considered both presently and under the proposed law to be fair use.* The child does not do this for commercial purposes. This is made clear in the report." (117 Cong. Rec. 34748–49 (October 4, 1971) (emphasis added).)

We submit that, when viewed in context, this legislative history clearly discloses a congressional intent that the doctrine of fair use exempt home-use recording, whether video or audio, from the copyright owners' monopoly.

CONCLUSION

The petition for a writ of certiorari to the Ninth Circuit should be granted.

Respectfully submitted,

JOHN A. DONOVAN
(Counsel of Record)
A. HOWARD MATZ
JOHN J. KRALIK IV
HUGHES HUBBARD & REED
555 South Flower Street
Los Angeles, California 90071
(213) 489-5140

Of Counsel:
LEO A. EGAN
BARRY J. WAGNER
PHILIP S. REISS
RAYMOND W. MERRITT

Attorneys for Amici Curiae
McCANN-ERICKSON, INC.,
BATTEN, BARTON, DURSTINE,
& OSBORN, INC.,
BACKER & SPIELVOGEL, INC.,
WARING & LAROSA, INC., and
AMMIRATI & PURIS INC.

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Amicus Brief

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NO. 81-1687

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Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,
Respondents.

Brief *Amici Curiae* of Minnesota Mining and Manufacturing Company, Fuji Photo Film Co., Ltd., and Maxell America, Inc., in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

SIDNEY A. DIAMOND
(Counsel of Record)
GRIER CURRAN RACLIN

1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 624-9000

Attorneys for *Amici Curiae*

Of Counsel:

SIDLEY & AUSTIN
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 624-9000

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INTRODUCTION

Minnesota Mining and Manufacturing Company (3M), Fuji Photo Film Co., Ltd. and Maxell America, Inc. respectfully file this brief *Amici Curiae* in support of the Petition for a Writ of Certiorari. Petitioners and Respondents have granted their consent to the filing of this brief pursuant to their "Written Consent of All Parties to Filing of Amici Curiae Briefs," on file with the Court.

Few cases have created such a flood of media comment (most of it hostile) as the decision of the court below in the present case, popularly known as "the Betamax Case."* The Ninth Circuit held that the use of a videotape recorder, or "VTR,"** to reproduce without specific permission copyrighted material transmitted to the public over television frequencies violated certain copyrights and did not constitute a "fair use" of that material.*** What rings false about the lower court's decision is the conclusion that activities conducted in the privacy of an individual's home with the aid of a new electronic device are tortious, thereby making the manufacturer of the device liable as a contributory infringer. Given the fact that over three million Americans have purchased VTRs primarily for the purpose of recording or "time-shifting" copyrighted television broadcasts for later viewing in their homes (see *infra*), and

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**See, e.g.*, New York Times, Oct. 20, 1981, at 1, col. 1; Oct. 21, 1981, §IV, at 5, col. 1; Oct. 25, 1981, §IV, at 7, col. 1; Oct. 28, at 26, col. 1 (editorial); Oct. 30, 1981, at 34, col. 4 (letter); Nov. 27, 1981, §IV, at 8, col. 5; Dec. 1, 1981, §IV, at 5, col. 4; Los Angeles Times, Oct. 20, 1981, §1, at 1, col. 6; Oct. 21, 1981, §II, at 11, col. 4 (cartoon); Oct. 21, 1981, §IV, at 1, col. 2; Oct. 21, §VI, at 1, col. 1; Oct. 23, 1981, §II, at 11, col. 3 (column); Oct. 27, 1981, §II, at 4, col. 4 (6 letters); Nov. 1, 1981, §V, at 3, col. 4; Nov. 1, 1981, §IV, at 4, col. 1 (editorial); Chicago Tribune, Oct. 20, 1981, §C1, at 1, col. 1; Oct. 21, 1981, §C1, at 3, col. 1; Oct. 23, 1981, §C1, at 18, col. 1 (editorial); Oct. 25, 1981, §2, at 4, col. 3 (cartoon); Oct. 31, 1981, §N1, at 9, col. 1 (column); Nov. 10, 1981, §C1, at 17, col. 4 (cartoon); Washington Post, Aug. 3, 1981, at C1; Oct. 20, 1981, at A1; The Christian Science Monitor, Oct. 21, 1981, at 2; UPI Releases, Oct. 19, 1981, "Appeals Court Throws Wrench in Homevideo Market"; Oct. 19, 1981, "Homevideo Violates Copyright Laws, Court Says"; Oct. 20, 1981, "Court Rules Home Videotaping Violates Copyright Laws"; Oct. 27, 1981, "Court Ruling Threatens Future of Home TV Recorders"; Dun's Bus. Month, Dec. 1981 at 43 "Video Recorder Decision Stuns Industry"; Bus. Wk., Nov. 2, 1981 at 58, "A Ruling That Threatens Video Recorder Sales"; Newsweek, Nov. 2, 1981 at 119, "The Betamax Embroglio"; New York, March 15, 1981, at 18, "Are You a Tape Criminal?"

**Also known as videocassette recorder or "VCR."

***"'Fair use' is a 'privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner . . .'." *Rosemont Enterprises* v. *Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), *quoting* Ball, Copyright and Literary Property 260 (1944); *Cf.* 17 U.S.C. §107.

that many more individuals intend to purchase VTRs in the near future, the degree of public outcry regarding the Ninth Circuit's opinion is not surprising.

STATEMENT OF INTEREST

The parties to this litigation do not represent all those directly affected by the Ninth Circuit's decision. The Petitioners, of course, represent the interests of the manufacturers of VTRs and their sales representatives and the Respondents represent the interests of the copyright owners. The Ninth Circuit's opinion, however, will have as severe an impact on the manufacturers of blank videotape as on the manufacturers of VTRs, yet the videotape manufacturers have heretofore been unrepresented in this litigation.

In general, videotape is the medium on which audio-visual material, such as television programs, is recorded either directly from a TV camera or indirectly from broadcast signals. Under current industry practice, professional producers record on the larger sizes of videotape formats such as 2-inch Quadruplex, 1-inch Helical Scan and 3/4-inch U-Matic formats. Video recording by individuals in the home, on the other hand, is done almost exclusively on 1/2-inch videocassette tape, which also has other uses.

It is estimated that approximately $320 million worth of 1/2-inch videocassettes were sold in the United States in 1981 for all purposes.* This amount is expected to grow to one billion dollars in 1986. Approximately 4.6 million individuals will purchase 1/2-inch videocassettes this year alone, with 17.5 million more purchases projected in 1986. The domestic manufacturers of 1/2-inch videocassettes** employ thousands of Americans and generate many million dollars worth of sales

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*Estimate made by the International Tape Association based upon a poll of its membership, December, 1981. All remaining estimates of sales, etc., herein were made by 3M.

**Manufacturers of 1/2-inch videocassettes with manufacturing plants in the United States include 3M, Sony, Maxell (as of June, 1982), TDK Electronics Corp., Memorex Corp., Ampex Corp., and BASF Canada, Inc. Sony alone employes over 1,800 people in its domestic tape plant. Petition for Writ of Ceritiorari hereinafter "Pet.") at 9.

and income taxes.* The market for 1/2-inch videocassettes is the most significant market for videotape manufacturers, and the most important segment of that market is the retail sales of blank 1/2-inch videocassettes for use in the home. It is estimated that in 1982 these home sales alone will be worth from $260 to $270 million.

Irrespective of what remedy might be ordered by the district court on remand, the videotape manufacturers are injured. The Ninth Circuit's sweeping decision creates great uncertainties in the law of copyright which have a stifling effect on the emerging videotape industry. The possibility that the district court might follow the court of appeals' suggestion to order an injunction against the future sales of VTRs or to impose a continuing royalty on VTRs and videotape cassettes has an injurious effect on videotape manufacturers. If an injunction is ordered, the anticipated growth in 1/2-inch videocassettes, conservatively forecast to be a billion dollar annual industry by 1986, would virtually be halted. A similarly injurious impact would result if, as suggested by the Ninth Circuit, the district court imposed a continuing royalty on VTRs or on the blank videocassettes. The rapid growth of the industry would at least be significantly retarded. The mere possibility that these remedies might be ordered has an immediate negative impact on innovation in the videotape industry. Halting the industry's technological growth clearly is not the intent of the Copyright Clause of the Constitution which was included, by its very terms, "to promote the progress of science and useful arts . . . ." U.S. Const. art. I cl. 8.

The injury imposed on the videotape industry as a result of the Ninth Circuit's decision is unjustified. It is indisputable that videotape, even more so than VTRs, is a "staple item of commerce," suitable for "substantial non-infringing uses" and not produced "primarily for the purpose" of facilitating violations of copyrights. Appendix to the Petition for Writ of Certiorari (hereinafter "Pet. App.") at 25-26. Videotape in the larger formats has been produced and sold for over 25 years, originally for the principal purpose of recording network programs for

*1982 sales taxes alone are projected to be over 21 million dollars.

later rebroadcast in different time zones and for archival preservation;* and later as a substitute for film in the production of television programs and commercials. Videocassettes were developed more recently; they are used for educational purposes, for authorized prerecorded tapes of motion pictures, and for other clearly lawful uses as well as for VTRs.**

In short, the future development of the videotape industry, particularly as it relates to 1/2-inch videocassettes, is negatively affected by the Ninth Circuit's decision notwithstanding the fact that the videotape manufacturers are "innocent bystanders" to any copyright violation. The videotape manufacturers, however, are not represented by the litigating parties. Furthermore, the manufacturers submitting this brief believe that the arguments made herein might not be otherwise presented to the Court. It is for these reasons that this brief *amici curiae* is submitted.

SUMMARY OF ARGUMENT

This Court should review the Ninth Circuit's failure to appreciate the special demands of media access made by the First Amendment in this case. By allowing "time shifting," or the delay of viewing of specific programs until a later time (which is their primary use), VTRs provide the public with new access to ideas transmitted over the broadcast frequencies. Such increased access has been recognized many times by this Court as a primary goal of the First Amendment. However, time shifting often requires the reproduction of copyrighted material, and thus has been argued to be a violation of the Copyright Act, 17 U.S.C. § 101, *et seq.* A conflict therefore arises between two fundamental goals of society and two provisions of the Constitution: a fully and freely informed public, the goal of the First Amendment, U.S. Const. amend. I, and the "progress of science and useful arts," the goal of the Copyright Clause, U.S. Const. art. I, cl 8. The Ninth Circuit failed to recognize that conflict, which should now be resolved by this Court.

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*Section 112 of the Copyright Act specifically sanctions these uses. 17 U.S.C. § 112.

**Cass, Revolution In the Wasteland 104-05 (1981).

The Court has never addressed the doctrine of fair use in copyright law, an "important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 17.1(c). As new technologies develop, issues regarding the application of the Copyright Act and the proper scope of the fair use doctrine will continue to arise. This Court, by withholding its Writ, should not permit the Ninth Circuit's decision in this case to guide those future holdings.

ARGUMENT

This Court Should Review the Ninth Circuit's Failure to Recognize the First Amendment Protection Applicable to Time Shifting

The Petition for Certiorari properly has requested this Court to review the inflexible analysis of fair use adopted by the Ninth Circuit in this case. At odds with the tenor of the Copyright Act* and the Act's legislative history,** in direct

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*The Ninth Circuit found that it was "noteworthy that the statute does not list 'convenience' or 'entertainment' or 'increased access' as purposes within the general scope of fair use." Pet. App. at 14. The statute, however, does not pretend to present an exhaustive list of potentially fair uses. It states only that the factors to be taken into account when determining whether a use is fair "shall include" the considerations listed there. 17 U.S.C. § 107.

**The House Report states in relevant part:

> [T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. . . . [T]he courts must be free to adapt the doctrine to particular stiuations on a case-by-case basis.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., 66; *see also* Rep. No. 94-473, 94th Cong., 1st Sess., 62. Similarly, the Senate Report states:

> [N]ew conditions arising in the future may alter the balance of equities. It is also important to emphasize the singling out of some instances to discuss in the context of fair use is not intended to indicate that other activities will or will not be beyond fair use.

S. Rep. No. 94-473, 94th Cong., 1st Sess., 63.

conflict with a decision of at least one court,* and without first deciding that contrary factual findings by the district court were "clearly erroneous,"** the Ninth Circuit narrowed the doctrine of fair use by imposing an unprecedented "productive use" limitation, and concluded that "time shifting," the onetime recording of a program for later viewing, was not a fair use of copyrighted television programming. Moreover, the appellate court in this case improperly ignored a Constitutional consideration crucial to the reaching of a correct decision. The Ninth Circuit's analysis was based upon precedents arising from the printed reproduction of copyrighted material. The court failed to consider adequately the fact that VTRs reproduce material which is broadcast over the public's scarce airwaves and which thus calls into play unique First Amendment considerations. *Columbia Broadcasting System* v. *Democratic National Comm.*, 412 U.S. 94, 101 (1973). With its copyright and fair use analysis mired in inapplicable precedent, the Ninth Circuit arrived at a conclusion totally inimical to a "paramount goal"*** of the First Amendment: the public's right to have access to the ideas transmitted over the broadcast media.

A. Time Shifting Allows New Access to the Media and is the Principal Use of VTRs

The testimony and surveys in the record establish that time shifting is the principal use of VTRs. Moreover, the district

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*The Ninth Circuit specifically referred to *Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. C1, 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975), which held that certain copying by the National Institutes of Health and the National Library of Medicine was fair use, as incorporating "*distortions of the fair use rationale . . . which, in our opinion, stretches fair use beyond recognition. . . .*" Pet. App. at 15-16 (emphasis in original). *See* Sup. Ct. R. 17.1, 17.2.

**Fed. R. Civ. P. 52(a).

****Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

court found that time shifting is used primarily to obtain otherwise unavailable access to programs transmitted over the broadcast media. Pet. App. at 82.

The "Crossley" survey introduced by Petitioners, for example, shows that approximately 96% of all VTR owners record and replay programs that they otherwise would be unable to see. Pet. App. at 48. The "Field" survey introduced by Respondents similarly concluded that approximately 75% of VTRs are used at least half of the time to record programs that otherwise would have been missed. *Id.* at 47-48. Given the fact that over 3 million people presently own VTRs, these surveys indicate that between 2.5 and 2.8 million people use VTRs most often to obtain otherwise unavailable access to ideas transmitted over the broadcast media.

The specific testimony of individual Betamax owners in this case also establishes that time shifting was their principal use of VTRs and that this use allowed new access to the media for later viewing of programs which otherwise would have been missed. It was their practice generally to view a tape once or twice soon after recording, and then to erase the tape to allow the recording of other programs in a similar fashion. Pet. App. at 43-47.

The record establishes, in short, that the use of VTRs is primarily directed not to the creation of tape libraries, but simply to overcome the scheduling limitations necessarily resulting from the scarcity of broadcast frequencies. VTRs overcome these limitations by "holding" the programs after they are transmitted until they can be viewed by the VTR owner. In effect, VTRs make the opportunity to view the programs, if not the programs themselves, no longer scarce. The result is to provide the 3 million VTR owners, and the millions more who will buy VTRs in the future, access to ideas transmitted over the broadcast media that they previously have been unable to enjoy.

B. Because Time Shifting Allows New Access to Ideas Transmitted Over the Broadcast Media, It Serves a "Paramount" First Amendment Goal

This Court has repeatedly held in a variety of contexts that the First Amendment guarantees the right to listen as well

as the right to speak, the right to read as well as the right to print, and the right to receive as well as the right to transmit.* Indeed, the right to receive ideas is recognized regardless of their social worth. *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969).**

The right to receive information has been particularly protected by this Court when that information is transmitted over the broadcast media. This Court has recognized that each medium of expression presents unique First Amendment problems that must be analyzed separately. *Metromedia* v. *City of San Diego*, 49 U.S.L.W. 4925, 4928 (July 2, 1981); *Columbia Broadcasting System, supra.* Due to the scarcity of the broadcast frequencies and the pervasiveness of the medium, the Court has held that the right to receive broadcast information enjoys the broadest First Amendment protection, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), while the right to transmit information over the medium is entitled to the most limited protection, *FCC* v. *Pacifica Foundation*, 438 U.S.

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*E.g., *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 566-67 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-763 (1972); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). See A. Meiklejohn, Political Freedom 25-28 (1960).

The right to receive information has served as a basis for many of this Court's decisions establishing the right to "speak." For example, the public's First Amendment right to receive ideas was the basis of this Court's recognizing the right of the press to attend and publish the results of trials, *Richmond Newspapers, supra;* the right of businesses to advertise, *Central Houston Gas & Electric Corp.* v. *Public Service Commission of New York;* 447 U.S. 557 (1980); *First National Bank of Boston, supra*; *Virginia State Board of Pharmacy, supra; Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965); the right to send uncensored mail, *Procunier* v. *Martinez*, 416 U.S. 396 (1974); the right to obtain a temporary non-immigration visa for a speaking engagement, *Kleindienst* v. *Mandel, supra;* the right to speak in favor of labor unions, *Thomas* v. *Collins*, 323 U.S. 516 (1945); the right to distribute religious handouts, *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Martin* v. *Struthers*, 319 U.S. 141 (1943); and the right to place "for sale" signs in front of homes, *Linmark Associations* v. *Willingboro*, 431 U.S. 85 (1977).

**"The line between the informing and the entertaining is too elusive for the protection of . . . freedom of the press." *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967) (citation omitted).

726, 748 (1977). Perhaps the most often cited statement of the dominant right of television viewers is Justice White's when, while speaking for the Court in *Red Lion, supra,* he stated:

> . . . differences in the characteristics of new media justify differences in the First Amendment standards applied to them. Because of the scarcity of radio frequencies, the government is permitted to put restraints on licenses . . . But the people as a whole retain their interests in free speech by radio and their collective right to have the media function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, and not the right of the broadcasters, which is paramount. . . . It is the right of the people to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

395 U.S. at 386, 390 [citations omitted].*

The presence of First Amendment considerations in this case greatly complicates analysis under the Copyright Act beyond that recognized by the court of appeals. On one hand, time shifting allows new access to broadcast programming and thereby serves a "paramount" First Amendment goal, *Red Lion, supra* at 390.** On the other hand, this access is accomplished by the recording of copyrighted material which is argued to be a violation of the Copyright Act, which, in turn, is derived

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**See also Columbia Broadcasting System* v. *Democratic National Comm.*, 412 U.S. 94 (1973), and Judge Learned Hand's decision in 1942 to uphold the FCC's "chain broadcasting" rules, *National Broadcasting Co.* v. *United States,* 47 F. Supp. 940, 946 (S.D.N.Y.), *aff'd* 319 U.S. 190 (1942), where he stated: "[T]he interest which the regulations seek to protect are the very interest which the First Amendment itself protects, *i.e.*, the interest, first, of the 'listeners. . . .'" *See also* this Court's statement in *Teleprompter Corp.* v. *Columbia Broadcasting System,* 415 U.S. 394, 408 (1973): "The privilege of receiving the broadcast electronic signals and of convertng them into sights and sounds of the programs inheres in all members of the public who have the means of doing so."

***It is also arguable that enjoining the use of VTRs to time shift would violate the user's First Amendment right to "speak" to himself or his family and friends.

from the Copyright Clause of the Constitution. U.S. Const. art. I, cl. 8. The Ninth Circuit failed to appreciate this conflict between two Constitutional provisions when it concluded that the recording necessary for time shifting violated the Copyright Act. When presented with First Amendment considerations, the court stated simply: "the statute does not list . . . 'increased access' as [one of the] purposes within the general scope of fair use . . . ," Pet. App. at 14, "in this case, there is no corresponding countervailing societal benefit to 'weigh against' the copyright interest of the author . . . ," *id.* at 16, "we fail to see how the method by which appellants have chosen to distribute their work is relevant . . . ," *id.* at 20-21. The previous discussion establishes that these conclusions clearly were erroneous. The fact that the Respondents chose to broadcast their material over the scarce public airwaves is *highly* relevant, and the First Amendment goals served by the increased access to the media allowed by time shifting is an important societal benefit to weigh against the copyright owners' interests.

Other courts have recognized the necessity of balancing the demands of the First Amendment when considering the public interest in analogous cases. For example, in *Rosemont Enterprises* v. *Random House, Inc.*, 366 F.2d 303 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), the court refused to enjoin the publication of a biography of Howard Hughes even though the biography contained without authorization articles copyrighted by the plaintiff. The court noted that whether the fair use privilege may be properly applied to a particular situation "turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information . . .," *id.* at 307. Similarly, in *Time Inc.* v. *Bernard Geis Associates*, 293 F.Supp. 130 (S.D.N.Y. 1968), the court allowed the unauthorized publication of copyrighted pictures of President Kennedy's assassination. The court found that: "There is a public interest in having the fullest information available on the murder of President Kennedy," *id.* at 146.*

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*See also *Berlin* v. *E.C. Publications*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 385 U.S. 1009 (1967); and *Meeropol* v. *Nizer*, 361 F.Supp. 1063, 1067-68 (S.D.N.Y. 1973), 417 F.Supp. 1201, 1207 (S.D.N.Y. 1976); *rev'd on other grounds*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

This Court addressed analogous balancing questions in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). In *New York Times*, the Court balanced the First Amendment right of the news media against the demands of a state libel statute and concluded that defamatory statements about public officials could constitutionally be actionable under the state law only if they were made with knowledge of their falsity or in reckless disregard of the truth. The Court reached a similar conclusion in *Time, Inc.*, when it balanced the First Amendment right of the press against the demands of a state privacy statute.

In the present case, the tape manufacturers represented in this brief believe that a similar application of First Amendment protections to the access obtained by time shifting would require reversal of the Ninth Circuit's decision.* In fact, this issue arguably was settled by the Court in *Red Lion, supra*, when it held that the public's right to have access to ideas transmitted over the media "may not constitutionally be abridged . . . by Congress. . . ." 395 U.S. at 390.** The Ninth Circuit's decision that the Copyright Act abridges the right to have access to the

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*It is important to note that reversal would not require the copyright owners to forego any return from the broadcasters' transmission of their works. The increased access by the VTR owners allowed by time shifting, and the resultant larger audience, should *increase* the return to the copyright holders from their contracts with the broadcasters. Reversal would only disallow the few objecting copyright holders from barring the access of VTR owners to the majority of programming that may be time shifted without objection.

It is also important to remember that the "copying" by VTRs at issue in this case is done, and viewed, solely within the privacy of the VTR owner's home. There is no publication to the general public of the work as in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), nor any commercial gain to the VTR users, *see Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 880 (S.D. Fla. 1978), *aff'd* 626 F.2d 1171 (5th Cir. 1980).

**It has also been argued that the First Amendment element always should out-weigh the interest of the copyright holders in cases such as this one because, unlike the public's right under the First Amendment, the copyright holder's interest is purely statutory. *See*, The Constitutional Dimension of "Fair Use" in Copyright Law, 50 N.D. Lawyer 790 (1975). The Copyright Clause only *empowers Congress* to protect the interests of the author, *Wheaton* v. *Peters*, 33 U.S. 591, 661-63 (1834), it does not, as does the First Amendment, grant certain rights directly to the public.

media through time shifting appears directly contrary to this Court's direction. Reversal might be accomplished either on the theory that the Copyright Act cannot properly be interpreted so as to require a violation of the First Amendment, *Crowell* v. *Benson*, 285 U.S. 22 (1932); *Triangle Publications* v. *Knight-Ridder Newspapers*, 445 F.Supp. 875 (S.D.Fla. 1978), *aff'd. on other* (fair use) *grounds*, 626 F.2d 1171 (5th Cir. 1980), and *see* Copyright and Free Speech: Constitutional Limitations on the Protection of Expression, 67 Cal. L. Rev. 283 (1979); First Amendment Exception To Copyright: A Proposed Test, 1977 Wisc. L. Rev. 1158 (1477); or under the statutory exception of fair use, *see, e.g., Triangle Publications* v. *Knight-Ridder Newspapers*, 626 F.2d 1171 (5th Cir. 1980); and *New York Times* v. *Roxbury Data Interface*, 434 F.Supp. 217 (D.N.J. 1977).*

Whether or not reversal is required in this case, what is crucial is that this Court agree to review these issues. What is being challenged here is not that the Ninth Circuit improperly balanced First Amendment considerations, but that it failed to balance those considerations at all. The lower court's ignoring of the First Amendment protections not only was in conflict with this Court's and other courts' opinions, but if allowed to stand, will lead other courts also to ignore First Amendment considerations when applying the provisions of the Copyright Act. This conflict between the copyright laws and the First Amendment, which the Ninth Circuit completely overlooked, is a fundamental issue of federal law which the Court should now resolve. Sup. Ct. R. 17(1)(c). It would be prejudicial to all concerned, including the general public, to await a district court decision on remand and a second appellate review before this Court considers the important questions decided by the court of appeals.

As stated previously, the Court has never addressed the proper interpretation of the fair use doctrine; and the use of VTRs to time shift the viewing of broadcast programming likely is only the first of many cases which will require re-interpre-

*"The fair use doctrine frequently serves to eliminate potential conflicts between copyright and free speech." *Triangle Publications* v. *Knight-Ridder Newspapers*, 626 F.2d 1171, 1174 (5th Cir. 1980) (citations omitted).

tations of the Copyright Act. As new technologies develop,* new balances between competing considerations will have to be struck. Decisions such as that of the Ninth Circuit in this case, which completely ignore one side of this balance, will lead not only to the suppression of these new technologies contrary to the intent of the Copyright Clause, but also will undermine the First Amendment. Furthermore, if courts refuse, as did the Ninth Circuit, to comply with Congress' direction not to freeze the doctrine of fair use during periods of rapid technological change,** results clearly unintended by Congress will again occur. This Court's guidance therefore is required to avoid such consequences.

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*These new technologies presently include video games and "read only memories" contained within computers. For examples of conflicting solutions to recently encountered copyright questions, compare *Data Cash Systems* v. *JS&A Group*, 480 F.Supp. 1063 (N.D. Ill. 1979), *aff'd* 628 F.2d 1038 (7th Cir. 1980), with *Tandy Corp.* v. *Personal Micro Computers*, 524 F.Supp. 171 (N.D. Cal. 1981). *See also Stern Electronics* v. *Kaufman*, No. 81-7411 (2d Cir. Jan. 20, 1982).

**H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., 66.

CONCLUSION

For each and all of the foregoing reasons, a Writ of Certiorari should issue in this case to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Sidney A. Diamond
(Counsel of Record)
Grier Curran Raclin
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 624-9000

Attorneys for *Amici Curiae*,
Minnesota Mining and Manufacturing Company, Fuji Photo Film Co., Ltd., and Maxell America, Inc.

Of Counsel:

Sidley & Austin
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 624-9000

Amicus Brief

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No. 81-1687

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, et al.,
Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for the States of Missouri, Alaska, Illinois, Iowa, Minnesota, Mississippi, Montana, North Carolina, Ohio, Oklahoma, Vermont and Wisconsin, as Amicus Curiae in Support of Petitioners Sony Corporation of America, et al.,

JOHN ASHCROFT
Attorney General of Missouri
P. O. Box 899
Jefferson City, Missouri 65102
314/751-3321
Counsel for Amicus Curiae

OF COUNSEL:
EDWARD D. ROBERTSON, JR.
Deputy Attorney General
P. O. Box 899
Jefferson City, Missouri 65102
314/751-3321

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

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JURISDICTIONAL STATEMENT

This brief, amicus curiae, respectfully is submitted by the State of Missouri pursuant to Rule 36.4 of this Court.

The states and attorneys general listed in footnote 1 accept and agree with the reasons for granting the writ expressed herein.[1]

---

[1] The Honorable Wilson L. Condon, Attorney General of Alaska, Pouch K, State Capitol, Juneau, Alaska 99811

The Honorable Tyrone C. Fahner, Attorney General of Illinois, 500 South Second, Springfield, Illinois 62701

The Honorable Thomas J. Miller, Attorney General of Iowa, Hoover Building–Second Floor, Des Moines, Iowa 50319

The Honorable Warren R. Spannaus, Attorney General of Minnesota, 102 State Capitol, St. Paul, Minnesota 55155

The Honorable William A. Allain, Attorney General of Mississippi, P. O. Box 220, Jackson, Mississippi 38205

The Honorable Michael T. Greely, Attorney General of Montana, State Capitol, Helena, Montana 59601

The Honorable Rufus L. Edmisten, Attorney General of North Carolina, Department of Justice, P. O. Box 629, Raleigh, North Carolina 27602

The Honorable William J. Brown, Attorney General of Ohio, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215

The Honorable Jan Eric Cartwright, Attorney General of Oklahoma, 112 State Capitol, Oklahoma City, Oklahoma 73105

The Honorable John J. Easton, Attorney General of Vermont, Pavilion Office Building, Montpelier, Vermont 05602

The Honorable Bronson C. La Follette, Attorney General of Wisconsin, P. O. Box 7857, Madison, Wisconsin 53702

INTEREST OF AMICUS CURIAE

The State of Missouri is home to nearly five million persons more than three million of whom reside in metropolitan areas, the remainder living in rural areas of the state. These five million Missourians live in approximately 1,791,270 households; over 97% of these households (approximately 1,760,200) are "television" households. Approximately 24,400 of these "television" households are also "videotape" households, i.e., they have videotape recorders (VTRs).

There are twenty-two (22) commercial television stations and four (4) public/educational television stations licensed by the Federal Communications Commission (FCC) to broadcast within Missouri, over VHF and UHF assigned frequencies. Applications are presently pending before the FCC for additional broadcast licenses for new stations to operate over VHF and UHF frequencies in the state. Additionally, applications to the FCC for 46 low power (neighborhood) television stations have been made by Missourians.

America is television oriented; Missourians, like their counterparts in the other 49 states, are television-oriented. Television is no longer a luxury; it has become a necessity. Missouri's citizens rely upon this widely-accepted technological phenomenon for not only entertainment, but also education, culture and news. Television has become more than a source of these; it plays a role in shaping our society. Its broadcasts allow us to experience history, form the substance of coffee klatch conversation, become the subjects of sermons and speeches, and provide instant commonality between strangers. Assessibility to the full range of television programming is an essential component of the well-rounded citizen. Videotaping enhances accessibility to television programming; the use of videotape recorders contributes to the public welfare.

The district court below was confronted with the singular issue of whether any one or more of *only* 32 instances of home recording, by *only* four individuals, of commercial television station programming licensed by *only* two copyright owners, was infringement. The district court's opinion was that none of these instances constituted infringement.

This very limited factual situation now has generated an opinion by the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") which far transcends the original issue and which affects millions of citizens of the United States, including therein citizens of the State of Missouri. The Court of Appeals' opinion holds that:

> (a) "we conclude that off-the-air copying of copyrighted audiovisual materials by owners of videotape recorders in their own homes for private noncommercial use, constitutes an infringement of appellants' copyrighted audiovisual materials". (Pet. App. 12);
>
> (b) "It is our conviction that the fair use doctrine does not sanction home videorecording." (Pet. App. 18);
>
> (c) "we have found that home video recording constitutes copyright infringement". (Pet. App. 27);
>
> (d) "we find no Congressional intent to create a blanket home use exception to copyright protection and that home video recording does not constitute fair use". (Pet. App. 30).

The opinion thus holds that *all* home video recording by Missouri citizens of free off-the-air television broadcasting is copyright infringement. No citizen of Missouri, in fact no citizen of any State, was afforded an opportunity to have counsel and to be represented in any court

below before this sweeping pronouncement of law was made.[2]

Subsequent to this opinion, the president of the Record Industry Association of America, Inc., has announced:

> "There is no 'legal immunity' for home audio taping in the current copyright law. There is no immunity for home audio taping in any of the statutory exemptions, or anywhere else in the 1976 [copyright] act or its legislative history". *The Washington Post*, December 15, 1981.

The Court of Appeals' opinion outlawing all home *video*recording thus may be a precursor to an imminent legal attack on home *audio*recording.

Although petitioners have some interests in common with your *amicus*, your *amicus* believes it best can represent the interest of the citizens of the State of Missouri in preserving their fundamental and underlying personal right to home record from free off-the-air television for subsequent private family viewing at home.

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[2] Defendant A. W. Griffiths was the only VTR owner named as a party in the proceedings below. He never appeared as a party, he never had counsel, and respondents waived all claims against him for legal relief (Pet. App. 43-44; Tr. A88, A158-9).

REASONS FOR GRANTING THE WRIT

1. VTR Serves the Purpose of Free Off-The-Air Television Broadcasting

Congress asserted its exclusive jurisdiction over all radio (and eventually television) transmission and communication within and between the States by the Radio Act of February 23, 1927 (44 Stat. 1170). That jurisdiction has continued to date under the Federal Communications Act of June 19, 1934 (47 U.S.C. § 301 et seq.; 48 Stat. 1081 et seq.).

Under 47 U.S.C. §§ 307(a), 309(a) (as under §§ 9, 11 of the Radio Act), public radio and television broadcast stations are licensed for the purpose of serving "the public interest, convenience and necessity". The Third Annual Report of the Federal Radio Commission (p. 32) said, "Broadcasting stations are licensed to serve the public and not for the purpose of furthering private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this".

Television programming in Missouri includes news, weather reports, current events, documentaries, talk shows (national and local), sports, religious, educational and instructional, market reports—as well as entertainment.

The people of the State of Missouri include both urban and rural residents. All of them have an interest in free off-the-air television programming, but many of them are employed (or otherwise unavailable) at the time of broadcasts which they both need and want to see. E.g., farmers need weather and market reports but their free time from work frequently does not coincide with television broadcast schedules; night shift workers are entitled to keep current with the rest of the nation as to prime time broadcasting

even if they have to view it the next day; etc. The VTR furthers the public's "interest, convenience, and necessity" by enabling persons to see programming which they otherwise would have to miss.

The federal law always has provided for free reception and viewing of these television programs which are "broadcast . . . for the use of the general public" (47 U.S.C. § 605; § 27 of the Radio Act). Never has the law limited the means of public reception; never has the law required viewing by the public to be simultaneous with the broadcast.

2. Most Off-The-Air Television Broadcasts Are Available for Home Recording

Evidence at the trial of this action showed both professional and amateur sports broadcasts available for home VTR reception with the owners' consent—and showed that 49% of VTR owners record sports broadcasts.

Evidence showed religious programming available for home VTR reception with the owners' consent—and showed that 10% of VTR owners record religious broadcasts.

Evidence showed educational programming available for home VTR reception with the owners' consent—and showed that 63% of VTR owners record educational programming.

Evidence showed that 42% of VTR owners record NBC programs—and showed that NBC's parent corporation, RCA, markets VTRs.

Evidence showed that 74% of VTR owners record local programming (news, documentaries, public events)—and showed that broadcast stations erase most of their local programming without even registering it for copyright.

A "Home Video" study prepared for the FCC dated 1 November 1979 synopsized "five major studies of VCR use", finding "it is clear that the principal use of the VCR to date is for time-shift viewing". Also, "Because rating services are prepared to report such time-shifting, broadcasters should actually be helped by this consumer convenience. An audience that was previously unavailable to them is now viewing, and the viewing is properly attributed in audience reports . . . . Most [playback] occurs relatively quickly after the recording (almost all within a week). Most of such recordings are viewed only once (usually only by members of that household) . . . ." (pp. 61-62).

A March 15, 1980, report prepared for the Corporation for Public Broadcasting showed home recording from Public Broadcasting Service ("PBS") stations was highest during fringe-time periods (the three hours before prime time) when *MacNeil/Lehrer, Washington Week, Wall Street Week,* etc. were broadcast. At least 68% of PBS recordings is played back within two days. (Respondents' programming does not appear on PBS).

3. This Action Shows No Justification for Preventing Home-Use Recording of Free Off-The-Air TV

The district court found, based on uncontroverted evidence, that the VTR is a "staple item of commerce", "used for purposes where no infringement could be alleged (*e.g.*, recording material which is not copyrighted or where permission to record is given" (Pet. App. 92, 106-7). The Court of Appeals' contrary and arbitrary holding that "videotape recorders are not 'suitable for substantial noninfringing use' " (Pet. App. 26) is untenable if the accepted and usual course of judicial proceedings is to be followed.

If VTR suppliers are held liable for infringing home-use recording which they cannot control (the district

court found, and common sense makes obvious, that petitioners "have neither the right nor the ability to control Betamax purchasers' use of the machines in their homes"—Pet. App. 98), then they cannot be expected to supply VTRs for any purpose.

The evidence showed only time-shift usage of the Betamax VTR with respect to respondents' works—and no damage. Respondents well could be deemed to have consented to such usage of their copyrighted works when they elected to exploit them on free TV. But even if not, the price of depriving the public of VTRs in order to prevent home recording of respondents' works is far too high—as well as legally unjustifiable.

Home-use VTRs were sold in the United States for ten years (1965-75) without objection from anyone before respondents brought this action. This action was commenced some six and one-half years ago and no other copyright owner has brought an infringement action against anyone for home recording. Respondent Disney has said publicly it would not do so again (Appendix 1 hereto). Free off-the-air TV is not "for private gain . . . . It is a public concern, impressed with a public trust, and to be considered primarily from the standpoint of public interest . . . ." (2 Ann. Rept. Fed. Radio Comm. 168-9). This Court should not permit one or two copyright owners to dictate and alter the public's established use of radio frequencies which were allotted for the public's interest, convenience and necessity.

Respectfully submitted,

JOHN ASHCROFT
Attorney General of Missouri

P. O. Box 899
Jefferson City, Missouri 65102

WILSON L. CONDON
Attorney General of Alaska

Pouch K, State Capitol
Juneau, Alaska 99811

TYRONE C. FAHNER
Attorney General of Illinois

500 South Second
Springfield, Illinois 62701

THOMAS J. MILLER
Attorney General of Iowa

Hoover Building–Second Floor
Des Moines, Iowa 50319

WARREN R. SPANNAUS
Attorney General of Minnesota

102 State Capitol
St. Paul, Minnesota 55155

WILLIAM A. ALLAIN
Attorney General of Mississippi

P. O. Box 220
Jackson, Mississippi 38205

MICHAEL T. GREELY
Attorney General of Montana

State Capitol
Helena, Montana 59601

RUFUS L. EDMISTEN
Attorney General of North Carolina

Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

WILLIAM J. BROWN
Attorney General of Ohio

State Office Tower
30 East Broad Street
Columbus, Ohio 43215

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

112 State Capitol
Oklahoma City, Oklahoma 73105

JOHN J. EASTON
Attorney General of Vermont

Pavilion Office Building
Montpelier, Vermont 05602

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

P. O. Box 7857
Madison, Wisconsin 53702

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this ____ day of April, 1982, to:

DEAN C. DUNLAVEY,
(Counsel of Record),
DONALD E. SLOAN,
Gibson, Dunn & Crutcher,
515 South Flower Street
Los Angeles, California 90071
Attorneys for Petitioners
Sony Corporation of America, et al.

STEPHEN A. KROFT
Attorney at Law
9601 Wilshire Boulevard, Suite 444
Beverly Hills, California 90210
Attorney for Respondent Universal
City Studios, Inc. and Walt Disney
Productions

APPENDIX 1

In response to numerous inquiries from the news media, Walt Disney Productions' chairman, E. Cardon Walker, issued the following statement related to the recent ruling by the United States Court of Appeals for the Ninth Circuit, on the subject of infringement of copyright laws:

"Walt Disney Productions welcomes and will support appropriate and meaningful legislation to eliminate any liability for individuals videotaping copyrighted television programming for personal use off their home TV sets, as long as safeguards are also provided to prohibit mis-use of creative product.

"Millions of families in the United States and around the world are now involved in videotaping programming in their own homes for their own private use. We have no intention, in this or any other litigation, of pursuing individuals to interfere with this practice.

"We first initiated this case in 1976, more than five years ago, when there were relatively few tape recorders in homes. Since that time we have come to realize that the interests of all concerned can be better accommodated by passage of new laws.

"We feel there is compelling justification for legislation to insure that specific limits be placed on the dissemination and distribution of copyrighted videotape materials beyond use in the home where it was recorded.

"Disney will continue to pursue the current litigation against the Sony Corporation, its distributors, retailers and advertisers, until an acceptable solution can be reached.

Amicus Brief

11

No. 81-1687

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, et al.,
Petitioners,

—v.—

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,
Respondents.

BRIEF AMICUS CURIAE OF MOTION PICTURE AND TELEVISION PRODUCERS AND DISTRIBUTORS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STUART ROBINOWITZ
(Counsel of Record)
ROBERT S. SMITH
345 Park Avenue
New York, New York 10154
(212) 644-8000
Attorneys for Amici Curiae

Of Counsel:

Stephen D. D. Hamilton
Andrew J. Peck
Martin Klotz
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
345 Park Avenue
New York, New York 10154
(212) 644-8000

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BRIEF AMICUS CURIAE OF MOTION PICTURE AND TELEVISION PRODUCERS AND DISTRIBUTORS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTERESTS OF AMICI CURIAE

This brief is filed in opposition to Sony Corporation of America's ("Sony") Petition for a Writ of Certiorari on behalf of *amici* Columbia Pictures Industries, Inc., Embassy Communications, Lorimar Productions, Inc., MTM Productions, Metro-Goldwyn-Mayer Film Co., Paramount Pictures Corp., Rosebud Releasing Corp., D.L. Taffner/Ltd., Tandem Productions, Twentieth Century-Fox Film Corporation, Twentieth Century-Fox Television, Inc., United Artists Corporation, United Artists Television, Inc., Warner Bros. Inc., and Viacom International Inc.[1]

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1 The parties in this case have filed with the Court a general consent to the submission of briefs *amicus curiae*.

Amici produce and/or distribute theatrical feature motion pictures and/or television programs, including made-for-television movies, documentaries, specials, mini-series and regular series. *Amici* and respondents own the statutory copyrights of a great deal, if not most, of the popular entertainment programming on television today. Sony threatens to erode the value of those copyrights by marketing a videotape copying machine (or "VCR") called Betamax. The commercial success of Betamax is based primarily on the copying of *amici*'s and respondents' copyrighted creations.

The Ninth Circuit correctly held that Sony was guilty of contributory copyright infringement. That result was compelled by the language of the Copyright Act, its legislative history and well-accepted precedents. The leading copyright scholars all agree. Sony, in its current petition, fails to raise a single issue worthy of certiorari.

Moreover, the petition is ill-timed. There is no final judgment yet because the district court has not passed on Sony's affirmative defenses or on the critical question of a remedy. More important, Congress is now actively considering legislation that would resolve the public policy, economic and social questions involved in accommodating the interests of copyright owners, the public and VCR manufacturers. The legislative solution, supported by the Copyright Office, would immunize consumers from personal liability while imposing a reasonable royalty on Sony and other manufacturers and importers of VCRs and blank tapes. Hearings on such legislation are almost complete. The legislation is moving forward expeditiously. To grant this petition might well have the effect of delaying legislation.

BACKGROUND FACTS

The Production and Distribution of Theatrical Motion Pictures

Theatrical feature films are the most complex and expensive form of copyrighted material that exists today. The average

investment in a feature ranges from $10,000,000 to $20,000,000. Production and distribution of feature films, moreover, is a high risk venture. Only about two out of ten films recoup their investment from theatrical exhibition. Accordingly, post-theatrical markets—the markets most directly threatened by Sony—are critical to the vitality of the film community and all its creative forces.

After initial theatrical exhibition, motion pictures are generally licensed to pay cable or pay television for repeated exhibitions over a period of several months. Thereafter, popular films are typically licensed to the television networks for two or more exhibitions over a period of several years. Then, films are normally released to individual television stations for many exhibitions under a series of multi-year licenses. In addition, feature films are now sold or rented to consumers in the form of pre-recorded video tapes or discs. Some films are also licensed for performances in the home-rental 16 mm market, on college campuses, on airplanes and ships, and in various other non-theatrical forums.

Massive videocopying by countless VCR owners threatens all these critical subsidiary markets for motion pictures. For example, Betamax can duplicate a popular new motion picture when it is exhibited on pay cable in its complete unedited form without commercial interruptions; or it can make a copy of a recent film on its first network run and delete the commercials. Private film collections, amassed in this manner, will adversely affect the sale or rental of pre-recorded tapes and discs, later exhibitions of feature films on television or in theatrical re-releases, and home and other non-theatrical 16 mm rentals. If a viewer copies "Star Wars" or "Superman," he or she will have no incentive to purchase or rent a pre-recorded tape or disc of that film or to view its television or theatrical re-runs. By preempting vital markets, VCR copying will make producers less able and less willing to create new and innovative films. That will discourage creativity and diversity contrary to the goal of the copyright clause in the Constitution.

The Production and Distribution of Television Programs

Television programs, like feature films, are a highly complex and expensive form of copyrighted material. Today, a made-for-TV movie may cost $2,500,000 to $3,000,000 to produce; a one-hour series, $700,000 to $1,000,000; and a regular half-hour TV series, $300,000 to $400,000 per episode. Television production is also a high risk affair. Television programs rarely recoup their large investments during their network runs and, as a result, producers are heavily dependent on post-network exhibitions on individual stations in the syndication market.[2]

Betamax directly threatens the post-network market that is so critical to television producers. A Betamax owner who makes (or borrows) a taped copy of "Roots" or a popular made-for-television movie or other television program will have no incentive to watch that program when it is re-broadcast.

The Impact of VCRs

The corrosive impact of videocopying on creative forces in the film and television communities—on copyright owners, artists, writers, directors and other talent—is real and increasing. There are now 3,000,000 VCRs in the United States (Pet. 9). Sales are increasing at a rapid rate.[3] As VCRs proliferate, the erosion of copyright values will be aggravated.

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2 See district court opinion (Pet. App. 37); *Memorandum Opinion and Order In Re Network Television Broadcasting*, 25 F.C.C.2d 318, 330 (1970), *aff'd sub. nom. Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470 (2d Cir. 1971). *See also* Grover, *Delayed Payoff TV Series Only Becomes Profitable for Producers Upon Syndication, Years After They Are Made*, Wall Street Journal, Dec. 27, 1977, at 26, Col. 1. "A syndication requires 60-120 episodes, which means 3-5 years of successful first-run network exhibitions if the package is all of one series" (Pet. App. 37). Very few series last that long today in light of frequent network scheduling changes.

3 *Mart*, January, 1982, at 9, 18, 24.

Sony reportedly believes—and understandably so—that "it has a razor-and-blades situation with the Betamax unit and the profitable recording tapes it requires." [4] Sony apparently looks to the sales of large amounts of blank tapes as its major source of profits over the long run. But the razor and the blades—the machine and the tapes—exist only because of the copyrights of program suppliers such as *amici* and respondents.

Sony attempts to obscure this fact (Pet. 4-5). It seeks to create the impression that the copying of copyrighted material is only a minor part of Betamax's function. But it is the popular movies and television programs that fuel VCRs' growth. That is what people copy.[5] As the Ninth Circuit noted:

> "Videotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Virtually all television programming is copyrighted material." (Pet. App. 25-26)

Sony also suggests that Betamax is only a "time-shift" machine that allows viewers to adjust to the scheduling practices of television. But Betamax is far more. It has also been designed, promoted and advertised by Sony to make permanent copies of popular films and television programs (Pet. App. 41-42). If Betamax were merely used for "time shifting," consumers would need only a handful of tapes because they are erasable and reusable. But VCR owners typically own about 25

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4 *Business Week*, Nov. 29, 1976, at 29.

5 Sony also claims (Pet. 5) that respondents' copyrighted programming "constitutes less than 5% of commercial station broadcasting, and constitutes no part whatsoever of public/educational station broadcasting." But Sony omits to mention that the remaining programs are almost all copyrighted. *Amici* own a large portion of the copyrights. The percentage of programming owned by the particular parties who brought this test case is obviously irrelevant.

or more tapes which cost approximately $500 (Pet. App. 39, 47).[6]

Viewers would not be buying so many blank tapes at such great expense if Betamax were a mere "time-shift" device. Those tapes (the blades for Sony's razors) are being sold by Sony, at substantial profit, to create permanent libraries of film classics. As the Register of Copyrights noted at the recent Congressional hearings, "[b]y any calculation . . . substantial librarying is occurring".[7] Sony seeks to avoid the fact that VCRs are used for librarying because it virtually concedes (Pet. 17, 19 n.19) that such activity violates the copyright laws.

Moreover, even when a viewer "time-shifts," he is making a *copy* of a copyrighted program. That act of *copying* infringes the prohibition of copying in the copyright law. When time-shifting, a viewer is making an uncompensated copy of the copyright owner's property. In addition, time-shifting causes actual and potential injury to copyright owners. When time-shifting, viewers generally delete commercials.[8] Time-shifting also means that programs do not reach particular audiences or time periods for which they are targeted. Moreover, Nielsen and other audience surveys do not count the viewers who play-back taped television programs. All of the foregoing factors undercut the basis for copyright payments from advertiser-supported television.

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6 The three Betamax owners who were defendants or witnesses in this case had collections of 340, 170 and 100 tapes (Pet. App. 43-46). Survey evidence also shows that most Betamax users own large numbers of cassettes (*id.*, p. 47).

7 Memorandum of David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services, before the Committee on the Judiciary, United States Senate, 97th Cong. 2d Sess., April 21, 1982 at 9 (hereinafter the "Ladd Memorandum").

8 They eliminate commercials by pressing the pause switch when recording or the fast-forward button when playing back the tape. According to the most recent survey evidence submitted at the pending Congressional hearings, nearly 85% of VCR owners reported that they "skip commercials or erase them." Ladd Memorandum, Appendix II.

In short, whether VCRs are used for "time-shifting" or "librarying," there is massive nationwide copying of *amici*'s and respondents' creative works and significant erosion of the copyright value of those works.

ARGUMENT

Summary of Argument

The Ninth Circuit held that videocopying violates the flat ban against copying in the Copyright Act; that there is no contrary legislative intent or fair use defense; and that Sony is a contributory copyright infringer. The Ninth Circuit's decision is clearly correct. It is in accord with the language and legislative history of the Copyright Act and with the unanimous views of all leading copyright experts here and abroad, including David Ladd, the Register of Copyrights;[9] Professor Melville B. Nimmer;[10] Jon A. Baumgarten, former General Counsel of the Copyright Office;[11] Professor Laurence H. Tribe;[12] leading experts in the international copyright commu-

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9 Ladd Memorandum, supra; also see Remarks by David Ladd, Cong. Rec., Nov. 4, 1981, at 5149:

> "[T]he public is served quite as much by a respect for property—and copyright is the highest kind of property—as by expropriating it from its creators and owners for mass, free use."

10 Memorandum of Professor Nimmer submitted to the Judiciary Committee, United States Senate, 97th Cong. 2d Sess., April 21, 1981 (hereinafter the "Nimmer Memorandum"); and 3 *Nimmer on Copyright* § 13.05[F][5] at 13-95-96 n.159 (1981).

11 Memorandum submitted to the Judiciary Committee, United States Senate, 97th Cong. 2d Sess., April 21, 1982 (hereinafter the "Baumgarten Memorandum").

12 Memorandum submitted to the Judiciary Committee, United States Senate, 97th Cong. 2d Sess., April 21, 1982, at 30-39 (district court's decision "[t]o create a multibillion dollar, retroactive exception to the copyright law on the basis of these sparse statements . . . is [a] radical a departure from established practice") (hereinafter the "Tribe Memorandum").

nity;[13] and law journal commentators.[14] Indeed, Sony should not be surprised by the Ninth Circuit's opinion because for many years Sony itself placed clear warnings on its machines indicating that VCR copying of copyrighted programs was illegal (Pet. App. 42). In short, this case was correctly decided. There are no conflicting opinions.

Sony, in its present petition, fails to raise a single issue worthy of certiorari:

1. There is no basis for Sony's claim that the Copyright Act *sub silentio* incorporates an *implied* exemption for home video taping. That theory rests on a fanciful version of legislative history that contradicts the unambiguous language of the Copyright Act.

2. There is no basis for Sony's claim that the Ninth Circuit's opinion raises "confusion" under the doctrine of fair use. The Ninth Circuit applied time-honored principles of fair use in finding that Sony had failed to meet a single requirement of that defense.

3. There is no basis for Sony's claim that the Ninth Circuit defied this Court's prior opinions in finding that Sony was guilty of contributory copyright infringement. The Ninth Circuit followed this Court's precedents, including the copyright decision that Sony concedes is most in point.

4. Finally, there is no basis for Sony to ask for an advisory opinion as to the power of the district court to

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13 *Report of Berne Union Working Group on the Legal Problems Arising from the Use of Videocassettes and Audiovisual Discs*, Feb. 21 to 25, 1977, reprinted in *Copyright*, April 1977, at 87-92, ¶¶ 32-34.

14 *See, e.g.*, Marsh, *Betamax and Fair Use: A Shotgun Marriage*, 21 Santa Clara L. Rev. 49 (1981); Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 Stan. L. Rev. 243 (1979); Note, *Universal City Studios, Inc. v. Sony Corp.: "Fair Use" Looks Different on Videotape*, 66 Va. L. Rev. 1005 (1980); Note, *Copyright—Fair Use—Recording of Televised Copyrighted Works in the Home*, 55 Tulane L. Rev. 1295 (1981); Note, *Copyright: Gone With the Betamax*, 8 Rev. L. & Soc'l Change 45 (1978).

order a continuing royalty or compulsory license scheme. That issue is not ripe because the district court has not yet fashioned any remedy.

Sony thus has failed to advance a single *bona fide* reason to grant certiorari.

There are compelling reasons not to do so. First, the case is not finally adjudicated because the district court has not yet passed on Sony's affirmative defenses or fashioned relief. Second, and most important, Congress is now in the midst of intensive efforts to devise a legislative solution that would balance the rights of copyright owners, the public and VCR manufacturers—namely, a compulsory license that would relieve consumers of personal copyright liability while imposing reasonable royalties on Sony and other manufacturers and importers of VCRs and blank tapes. The Copyright Office strongly supports this legislative solution.[15] Congress, which has virtually completed hearings on this matter, is uniquely able to weigh the policy, economic and social issues involved in the VCR controversy and to devise an appropriate remedy, as it has done in the case of other new technologies. The legislative activities are proceeding with unusual speed and momentum. Sony's premature petition should not be allowed to becloud the issue.

I.

THE NINTH CIRCUIT WAS CLEARLY CORRECT IN CONCLUDING THAT COPYING OF MOTION PICTURES AND TELEVISION PROGRAMS BY BETAMAX VIOLATES THE COPYRIGHT LAW.

A. Videocopying Violates the Copyright Act's Ban Against Copying

As the Ninth Circuit recognized (Pet. App. 5-6), copying on a Betamax violates the exclusive right of copyright owners to make copies of their copyrighted motion pictures and televi-

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15 Ladd Memorandum, *supra*.

sion programs under Section 106(1) of the 1976 Copyright Act (17 U.S.C. § 106(1)).[16]

After setting forth the exclusive and absolute rights of copyright proprietors in Section 106, the new Act goes on to spell out certain limited exceptions (Sections 107-118). Significantly, none of those exceptions permits home videotaping of motion pictures and television programs, even though VCRs were well known at the time of the passage of the new Copyright Act. The exemptions in the Act, as the Ninth Circuit notes (Pet. App. 8-9), allow unauthorized use of various copyrighted materials for scholarly and other purposes, but afford a particularly high level of protection to motion pictures and other audiovisual material because they are "exceptionally vulnerable to copyright impairment." H.R. Rep. No. 83, 90th Cong., 1st Sess., at 61 (1967).[17] For example, while libraries and archives can make limited copies of copyrighted material for scholarly purposes under the new Act, they cannot do so in the case of motion pictures and other audiovisual works (Sec. 108(h)).[18] Sony should fare no better than the educational and philanthropic institutions which, although granted various exemptions by the new Act, are prohibited from making copies of motion pictures and television programs.

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16 The same conclusion was reached in the only other videocopying case under the new statute. *Encyclopedia Britannica Educational Corp.* v. *Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978) (videotaping of off-the-air educational television programs). The identical result was reached under Sections 1(a) and 1(d) of the 1909 Copyright Act, to which Section 106(1) in the new Act corresponds. *Goodson-Todman Enterprises, Ltd.* v. *Kellogg Co.*, 513 F.2d 913 (9th Cir. 1975); *Smothers* v. *Columbia Broadcasting System, Inc.*, 359 F. Supp. 723 (C.D. Cal. 1973); *Walt Disney Productions* v. *Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969).

17 "This is so because the capital investment is high, the risk of loss on any given work is large, and unauthorized copies tend to satisfy fully the demand for the lawful copy." Ladd Memorandum at 25.

18 Motion pictures and other audiovisual works are also specifically excluded from the exceptions contained in Sections 112(a), 118, 110 and 110(1).

B. There Is No Legislative History to Support a "Home Use" Exemption for Videocopying

Faced with the ban against copying in Section 106 and finding no exception for VCRs in Sections 107 to 118, Sony seeks to unearth some contrary legislative history for its cause. It primarily relies (Pet. 16) on an isolated sentence in the 1971 House Report on the stop-gap piracy amendment, the Sound Recording Amendment of 1971,[19] to the effect that the amendment was not intended to reach the taping of phonograph records at home for private use. But, as the Ninth Circuit points out (Pet. App. 16-17)—and as the leading copyright scholars all agree[20]—Sony's reliance is totally misplaced.

Sony's argument rests on a three-step exercise in reconstructing legislative history. Sony claims (1) that the 1971 piracy amendment included an implied exemption for home audio taping of phonograph records; (2) that this exemption for records was incorporated *sub silentio* into the omnibus Copyright Revision Act of 1976; and (3) that the implied exemption for records was *sub silentio* extended to videotaping of movies and television programs in the 1976 Act. Each link in the chain is flawed.

First, the interim 1971 amendment was aimed exclusively at the growing practice of commercial piracy. The amendment did not purport to deal with home taping of records. That subject is not even mentioned in the amendment. An isolated remark in the House—but not the Senate—Report surely does not create an exemption in the legislation. In any event, as the Ninth Circuit notes (Pet. App. 9-10), the 1971 House Report makes it crystal clear that motion pictures were not affected in any way by the amendment.[21]

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19 Act of October 15, 1971; P.L. 92-140, 85 Stat. 391.

20 Ladd Memorandum at 8-9, 36-37; Nimmer Memorandum at 3-12; Baumgarten Memorandum at 1, 5-9; Tribe Memorandum at 30-35; *see also* 3 *Nimmer on Copyright* § 13.05[F][5] at 13-95-96 n.159.

21 *See* H.R. Rep. No. 92-487, 92d Cong., 1st Sess., at 5-6 (1971).

Second, even if the 1971 amendment had implicitly created an exemption for the taping of records at home, that exemption was not carried over into the Copyright Revision Act of 1976. When Congress passed the comprehensive 1976 statute, superseding the interim anti-piracy amendment, it did not repeat the language of the 1971 House Report cited by Sony in any of its Reports, even though other portions of the 1971 House Report were repeated verbatim. As the present Copyright Register observes, the Senate Report for the new Act specifically negates the notion of a home use exemption.[22] And as Professor Nimmer declares: "There is not and never has been an exemption from copyright liability for home audio recording."[23]

Finally, even if the Copyright Revision Act of 1976 had secretly incorporated an implied 1971 exemption for audiotaping of phonograph records, Sony does not explain how that exemption was *sub silentio* extended to videotaping of motion pictures and television programs in the 1976 Act. On the contrary, as shown above, the new Act gives a high level of protection to audiovisual works.

Thus, the Ninth Circuit—in full accord with the nation's leading copyright scholars—correctly rejected Sony's claim that legislative history created an implied exemption for VCRs. Moreover, Sony's efforts to divine Congressional intent are wholly inappropriate here because the statute is unambiguous on its face. Since the statute is so clear, resort to legislative history is not proper. *United States* v. *Oregon*, 366 U.S. 643, 648 (1961). This Court recently warned against reading into a

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22 Ladd Memorandum at 8, *citing* S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975) at 66 (hereinafter the "Senate Report"). In that Report, the Senate Committee considered off-the-air videotaping within the context of educational uses. In sanctioning the copying of instructional transmissions for delayed viewing during a school's daily schedule in remote areas such as Alaska, the Senate Committee warned: "The Committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances be considered 'fair use'."

23 Nimmer Memorandum at 1; *also see* 3 *Nimmer on Copyright* § 13.05[F][5] at 13-95-96 n.159.

statute limitations and conditions which the legislature has not expressed. *Diamond* v. *Chakrabarty*, 447 U.S. 303, 308 (1980); *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 188 (1978). That rule applies in this case.

C. The Fair Use Defense Is Not Applicable

Unable to find statutory support for a home use exemption for VCRs, Sony is forced to rely on the "fair use" defense contained in Section 107 of the new Copyright Act. But fair use has nothing to do with Betamax's commercial exploitation of the property rights of copyright owners. The fair use doctrine does not sanction the copying of complete feature motion pictures and other television programs for convenience and amusement. Rather, as the Ninth Circuit pointed out (Pet. App. 14-19), the fair use doctrine is designed to serve the constitutional goals of copyright by allowing scholars, critics and others to use limited excerpts from prior copyrighted material in order to further their own independent creative endeavors.[24]

The new Copyright Act specifically characterizes fair use as involving "purposes such as criticism, comment, news, reporting, teaching . . . scholarship, or research" (Section 107). The House and Senate Reports give more concrete examples of activities which may be fair use under appropriate circumstances:

> "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration

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24 *See, e.g., Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967): "The fundamental justification for the privilege [of fair use] lies in the constitutional purpose in granting copyright protection in the first instance, to wit, 'To Promote the Progress of Science and the Useful Arts.' " *See also Meeropol* v. *Nizer*, 560 F.2d 1061, 1068-71 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Rubin* v. *Boston Magazine Co.*, 645 F.2d 80 (1st Cir. 1981); L. Seltzer, *Exemptions and Fair Use in Copyright* (1978) at 24; 3 *Nimmer on Copyright* § 13.05[B] at 13-62-68.

> or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."[25]

None of these activities bears any resemblance to Betamax copying of "Jaws" or "Rocky" for convenience and entertainment.

In light of this legislative history and time-honored precedents,[26] the Ninth Circuit in rejecting the fair use defense properly placed significant weight on the fact that Betamax copying involves an "intrinsic" rather than "productive" use of copyrighted material. But the Court did not, as Sony suggests (Pet. 22), stop its analysis at that point. Rather, the Ninth Circuit went on to weigh and balance the four "factors" listed in Section 107 of the new Act (Pet. App. 18-25).

The first factor, concerning the character of the use, weighs against Sony because videotaping is not for nonprofit educational purposes, but for amusement and convenience. "The Committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances be considered 'fair use'." Senate Report at 66.

The second factor, relating to the nature of the work, also undermines Sony's position because the works at issue (motion pictures and television programs) are not basically informational materials, but "creative, imaginative, and original"

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25 Senate Report at 61-62; H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 65 (1976).

26 See footnote 24, *supra*.

works[27] which, by their nature, are designed for repeated exhibitions.[28]

The third factor, the substantiality of the amount copied, is fatal to Sony. Fair use applies to copying small excerpts, not complete works.[29]

The final factor, the effect on the "potential market for or value" of the copyrighted work (Section 107(4)), also cuts strongly against Sony because VCR copies are "used for the same purpose as the originals" (Pet. App. 23 n.13).[30] "With certain special exceptions (use in parodies or as evidence in court proceedings might be examples) a use that supplants *any part* of the normal market for a copyrighted work would ordinarily be considered an infringement." Senate Report at 65 (emphasis added).[31]

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27 *Compare, e.g., MCA, Inc. v. Wilson,* 211 U.S.P.Q. 577 (2d Cir. 1981), *with, e.g., New York Times Co.* v. *Roxbury Data Inferface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977).

28 "In general terms it could be expected that the doctrine of fair use would be applied strictly to the classroom reproduction of entire works, such as musical compositions, dramas, and audiovisual works including motion pictures, which by their nature are intended for performance or public exhibition." Senate Report at 64.

29 *See Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *accord, e.g., Walt Disney Productions* v. *Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Wihtol* v. *Crow*, 309 F.2d 777 (8th Cir. 1962); *Leon* v. *Pacific Telephone & Telegraph Co.*, 91 F.2d 484, 485 (9th Cir. 1937); *Encyclopedia Britannica Educational Corp.* v. *Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978). Even for historical or scholarly works, as opposed to entertainment, courts have restricted fair use to the copying of small excerpts. *See, e.g., Meeropol* v. *Nizer*, 560 F.2d 1061, 1068-71 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). And, in the area of educational copying of printed works, there is no fair use privilege to reproduce a "sizeable integrated work published as an entity (a novel, treatise, monograph and so forth)." Senate Report at 64.

30 "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." Senate Report at 65.

31 As the Ninth Circuit correctly held (Pet. App. 23), the burden of proving the absence of potential harm rested with Sony. *See, e.g.,*

The Ninth Circuit's reasons for rejecting Sony's fair use defense are overwhelming under all of the criteria listed in the new Act and under well-established precedents. Instead of replying to the Ninth Circuit's rationale on this point, Sony mainly argues (Pet. 22) that its decision conflicts with *Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally div. Ct.*, 420 U.S. 376 (1975). But even the district court in this case recognized that *Williams & Wilkins* "has little precedential value" (Pet. App. 73). In that case, the Court of Claims permitted government libraries to copy medical articles from learned journals for critical scientific research. That is a far cry from what Betamax does. Moreover, the Court of Claims stated that its decision was merely "a 'holding operation' in the interim period before Congress" acted on the then pending revision of the Copyright Act (487 F.2d at 1363). Shortly thereafter, Congress did act. It sharply limited library copying for scholarly purposes and, significantly, did not authorize any such copying of motion pictures and other audiovisual works (Sec. 108(h)).[32]

D. Sony Is Liable as a Contributory Copyright Infringer

Sony is clearly liable as a contributory copyright infringer because it manufactures, advertises and sells the Betamax machines and tapes for "the primary purpose of reproducing television programming" (Pet. App. 25). Sony correctly states the law when it says (Pet. 24): "One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another may be held liable as

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Encyclopedia Britannica Educational Corp. v. *Crooks*, 447 F. Supp. 243, 247, 251 (W.D.N.Y. 1978). Sony did not meet that burden.

32 The Ninth Circuit questioned the rationale of *Williams & Wilkins* (Pet. App. at 15). Leading copyright scholars have also been critical of that opinion. Nimmer, *supra*, § 13.05[E][4][c] at 13-83. But such criticism of that isolated opinion hardly warrants a grant of certiorari, especially since Congress itself restricted that case's holding in the new Copyright Act.

a 'contributory infringer.' "[33] That is *exactly* what Sony does with Betamax.

The fact that Betamax purchasers rather than Sony perform the final act of copying does not immunize Sony. For example, in *Kalem Co.* v. *Harper Brothers*, 222 U.S. 55 (1911)—the copyright precedent relied on by Sony (Pet. 23 n.24)—the defendant Kalem had made an unauthorized motion picture of the plaintiff's copyrighted book "Ben Hur" and sold the film for ultimate theatrical exhibition by third parties. Kalem was held to have infringed the plaintiff's exclusive right of performance even though the film had actually been exhibited by independent theatres—*i.e.*, Kalem, like Sony, had not committed the final act of infringement. Justice Holmes wrote for a unanimous court: "It [Kalem] is liable on principles recognized in every part of the law." 222 U.S. at 63. So is Sony.

Sony also tries to analogize Betamax to a "staple item of commerce" like typewriters, cameras, or duplicating machines (Pet. 23-25). The flaw in the analogy is obvious. Unlike those neutral machines which have countless legitimate non-infringing uses, Betamax is designed, promoted and advertised to be used almost exclusively for the copying of popular copyrighted motion pictures and television programs. The ability to make copies of copyrighted movies and television programs is the *sine qua non* of Betamax. It is the basis on which Sony sells the "razor and the blades."

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33 *Kalem Co.* v. *Harper Brothers*, 222 U.S. 55, 62-63 (1911); *Universal Pictures Co.* v. *Harold Lloyd Corp.*, 162 F.2d 354, 365-366 (9th Cir. 1947); *Elektra Records Co.* v. *Gem Electronic Distributors, Inc.*, 360 F. Supp. 821 (E.D.N.Y. 1973) (record store with taping facilities is liable for unauthorized copying of records even though the final act of copying is performed by individual customers). *See generally Screen Gems-Columbia Music, Inc.* v. *Metlis & Lebow Corp.*, 453 F.2d 552, 554 (2d Cir. 1972); *Screen Gems-Columbia Music, Inc.* v. *Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 n.9 (S.D.N.Y. 1966) (Weinfeld, J.).

II.

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER ISSUES THAT ARE PRESENTLY, AND MORE PROPERLY, BEFORE CONGRESS AND THE DISTRICT COURT

In addition to Sony's failure to raise any issues worthy of certiorari, there are other compelling reasons to deny its petition.

First, the decision below is not yet final because the district court has not passed on Sony's affirmative defenses or fashioned relief. It is the usual practice of this Court to avoid reviewing non-final decisions.[34] This is a particularly strong case for adhering to that practice. The question of relief—*e.g.*, whether a continuing royalty or compulsory license should be awarded—is, even Sony concedes, a crucial issue. As the Ninth Circuit observed:

> "The relief question is exceedingly complex, and the difficulty in fashioning relief may well have influenced the district court's evaluation of the liability issue. The difficulty of fashioning relief cannot, however, dissuade the federal courts from affording appropriate relief to those whose rights have been infringed." (Pet. App. 28.)

Remarkably, Sony itself is now asking this Court to review the remedy issue, before the remedy has even been determined by the lower courts.[35]

Moreover, premature review of this non-final judgment would be particularly inappropriate here because the entire

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34 *See* R. Stern & E. Gressman, *Supreme Court Practice* at 300 (5th ed. 1978) ("[t]he Supreme Court will not usually grant certiorari to review a nonfinal judgment"); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967).

35 Question 4 of Sony's Petition.

VCR controversy is now under active consideration in Congress. Proposed legislation, supported by the Copyright Office and leaders in both Houses of Congress, would create a compulsory license for VCRs—it would immunize consumers from copyright liability while compensating copyright owners by imposing a reasonable royalty on Sony and other manufacturers and importers of VCRs and blank tapes.[36] The royalty would be set, collected and distributed to copyright holders by the Copyright Royalty Tribunal. Congress has recently enacted similar compulsory licenses to deal with other new technologies such as cable television.[37] Hearings on the pending VCR bills are almost complete. There is substantial momentum for legislation.[38]

To grant this premature petition could only have the effect of delaying a legislative solution. If the petition is denied and the case is remanded to the district court to complete the litigation, it is likely that Congress will have dealt with the problem before the case is finally adjudicated. In any event, the litigation is not ripe for review now.

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36 Amendment No. 1333 to S. 1758, 97th Cong., 1st Sess. (1981) (March 4, 1982) (introduced by Senator Mathias and co-sponsored by Senators Andrews, Baker, Baucus, Boren, Boschwitz, Burdick, Byrd, Cochran, Cranston, Dodd, Hart, Kasten, Kennedy, Mattingly, Melcher, Nunn, Pell, Riegle, Sasser and Stevens). Similar legislation was introduced in the House by Representative Edwards, H.R. 5705, 97th Cong., 2d Sess. (1982). The Edwards bill already has more than 60 co-sponsors. Legislation has also been introduced that would overturn the Ninth Circuit's opinion without providing any royalties. H.R. 4783, 97th Cong., 1st Sess. (1981) (introduced by Rep. Duncan); H.R. 4794, 97th Cong., 1st Sess. (1981) (introduced by Rep. Parris); H.R. 5250, 97th Cong., 1st Sess. (1981) (introduced by Rep. Foley); S.1758, 97th Cong., 1st Sess. (1981) (introduced by Sen. DeConcini).

37 17 U.S.C. § 111 (cable retransmission of distant television signals).

38 Similar legislation for videocopiers has been enacted in West Germany and Austria and is being considered in Norway, Sweden, Denmark, France and Japan. Ladd Statement at 47-48.

Conclusion

For all of the foregoing reasons, Sony's Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
May 10, 1982

Respectfully submitted,

STUART ROBINOWITZ
(Counsel of Record)
ROBERT S. SMITH
345 Park Avenue
New York, New York 10154
(212) 644-8000
Attorneys for Amici Curiae Motion Picture and Television Producers and Distributors

Of Counsel:

Stephen D. D. Hamilton
Andrew J. Peck
Martin Klotz
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

Amicus Brief

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No. 81-1687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, *et al.*,
Petitioners,

v.

UNIVERSAL STUDIOS, INC. and WALT DISNEY PRODUCTIONS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, AMICUS CURIAE, IN OPPOSITION

RICHARD M. COOPER
(Counsel of Record)
WILLIAMS & CONNOLLY
Hill Building
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-3017
Attorneys for Motion Picture Association of America, Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, AMICUS CURIAE, IN OPPOSITION

The Motion Picture Association of America, *amicus curiae*, submits this brief in opposition to the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The court's opinion is reported at 659 F.2d 963 (9th Cir. 1981).

All parties to this case have filed with the Court a letter of general consent to the filing of briefs by *amici curiae* in support of or in opposition to the petition for a writ of certiorari.

INTEREST OF THE AMICUS

The Motion Picture Association of America, Inc. is a not-for-profit corporation organized under the laws of the State of New York. It was originally incorporated in 1922 under the name, Motion Picture Producers and Distributors of America. Its basic purpose as stated in its by-laws is:

> "to foster the common interests of those engaged in the motion picture industry in the United States by establishing and maintaining the highest possible moral and artistic standards in motion picture production, by developing the educational as well as the entertainment value and the general usefulness of the motion picture, by diffusing accurate and reliable information with reference to the industry, by reforming abuses relative to the industry, by securing freedom from unjust or unlawful exactions and by other lawful and proper means."

The Association represents the major producers and/or distributors of motion pictures in the United States. Its present membership consists of the following eleven companies: Embassy Pictures; Columbia Pictures Industries, Inc.; Filmways Pictures, Inc.; Metro-Goldwyn-Mayer Film Co.; Orion Pictures Company; Paramount Pictures Corporation; Twentieth Century-Fox Film Corporation; United Artists Corporation; Universal Pictures, a division of Universal City Studios, Inc.; Walt Disney Productions/Buena Vista Distribution Co., Inc.; and Warner Bros., Inc.

The members of the association frequently license their products to pay television, television networks, and local stations for broadcasting over the airwaves. When broadcast, such products are subject to being copied on video recorders.

The Association has been actively involved in the efforts in the Congress, described in Part I below, to resolve legislatively the issues raised by the decision below.

Some (though not all) of the members of the Association are joining individually with certain other firms in a separate *amicus* brief.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE SUBSTANTIVE ISSUES PROPOSED FOR REVIEW—ALL STATUTORY—SHOULD BE LEFT TO THE CONGRESS

Each of the substantive questions proposed for review in the petition for certiorari involves the interpretation and application of a statute, the Copyright law, as revised in 1976, 17 U.S.C. §§ 101 *et seq.* (1976).[1] Each also involves the harmonization of divergent economic interests—those of makers of copyrighted works (including actors, actresses, musicians, and other artistic talent), and those of the manufacturers and distributors of video recording equipment. It is the conflict between the interests of these competing groups that has drawn attention to this case, and that conflict is a matter peculiarly suitable for resolution by the Congress.

It is now actively before the Congress. As petitioners acknowledge, "the Court of Appeals' decision prompted instant Congressional reaction." (Pet. 13.) Since the decision below last October, four bills have been introduced in the House of Representatives and two in the Senate to resolve definitively the issues proposed for review here. In the House, H.R. 4783 (introduced by Rep. Duncan), H.R. 4794 (introduced by Rep. Parris), and H.R. 5250 (introduced by Rep. Foley) would overturn the holding below; and H.R. 5705 (introduced by Rep. Edwards) would exempt owners of home audio and video recorders from copyright liability when taping in the privacy of their own homes, and also establish a mechanism to compensate owners of creative property for such copying. In the Senate, S. 1758 (introduced by Sen.

[1] Petitioners' fifth issue is a procedural one, which is not of general interest and does not warrant a grant of the writ.

DeConcini) would overturn the holding below; and Amendment No. 1333 to S. 1758 (introduced by Sen. Mathias) is similar to H.R. 5705.[2]

Consideration of all these bills is moving forward expeditiously. The Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary held hearings on the four House bills on April 12, 13, and 14, 1982. The full Senate Committee on the Judiciary held hearings on S. 1758 on November 30, 1981, and on April 21, 1982.

Enactment by the Congress of any of these bills would definitively resolve the issues proposed for review, and thereby would make unnecessary, or of no general effect, a decision by this Court. Even if this Court were to grant certiorari and decide the case, the final word might well be that of the Congress, as the history of copyright treatment of new technologies illustrates. *Cf., e.g., White-Smith Music Pub. Co.* v. *Apollo Co.*, 209 U.S. 1 (1908) (player-piano rolls), compulsory license imposed by Congress in § 1(e) of the Copyright Act of 1909;[3] *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) (cable TV) and *Teleprompter Corp.* v. *Columbia Broadcasting System*, 415 U.S. 394 (1974) (cable TV), compulsory license with royalties for copying of distant non-network signals imposed by Congress in § 111 of the Copyright Act of 1976.

As a legislative forum the Congress can address these policy issues more comprehensively, on the basis of a better factual record, with greater sensitivity to the competing economic interests, and with more diverse and creative substantive solutions than can a court, bound by the canons of statutory construction. Therefore, it would be appropriate for this Court, in the exercise of

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[2] Full citations of these legislative proposals are given in the Table of Authorities, *supra*.

[3] Ch. 320, 35 Stat. 1075; *see also* 17 U.S.C. § 101(e) (1964).

its discretion, to deny certiorari in this case out of deference to the ongoing Congressional process.

If the Congress should fail to resolve the issues proposed and other, similar cases should arise, the Court would still have ample opportunity to decide the issues. Its deliberations at that time would be aided by the consideration given to the issues by the Congress and by lower courts in other cases.

II. THIS CASE DOES NOT WARRANT THE GRANTING OF CERTIORARI

A. There Is No Conflict with Any Decision of this Court.

There is no conflict between the decision below and any decision of this Court. Petitioners contend (Pet. 23) that there is a conflict with *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476, 488-89 (1964); *Henry* v. *A. B. Dick Co.*, 224 U.S. 1, 48 (1912), *overruled on other grounds in Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917); and *Kalem Co.* v. *Harper Brothers*, 222 U.S. 55, 62-63 (1911). No such conflict exists, however.

Kalem was a suit by the holder of the copyright for a novel against the producer of a film that depicted events in the novel. The producer argued that it did not produce the infringing representations, but merely sold the film to others. This Court, in affirming a judgment for the plaintiff, answered: "The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made." 222 U.S. at 62-63. In the instant case, the court of appeals determined that "[v]ideotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming," that "[v]irtually all television programming is copyrighted material," and

that "[t]he corporate appellees 'know' that the Betamax will be used to reproduce copyrighted materials. In fact, that is the most conspicuous use of the product." (Pet. App. 25-26, 29) Thus, there is no conflict between *Kalem* and the decision below.

Nor is there any conflict with *Aro* or *Henry*. Both involved interpretations of the patent law rather than the copyright law. Even if indirectly relevant, neither is in conflict either with *Kalem* or with the decision below. Neither imposed any requirement for a contributory infringement suit that was not found to be satisfied by the Court in *Kalem* and by the court of appeals below.

B. There Is No Conflict Among the Circuits.

Nor is there any conflict among the circuits. The only decision relied on by petitioners as establishing such a conflict with the decision below is *Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975). (Pet. 22.) That case was radically different from the instant one. It involved a different technology—photocopying—which raises different economic, policy, and legal issues. The copying in that case occurred at the National Library of Medicine and the National Institutes of Health, and was done on behalf of scientists for the purpose of advancing medical research. Here, the copying is done in quite different surroundings and for purposes of entertainment.

The doctrine of fair use involves the application of several general "factors to be considered" to individual factual settings. Decisions applying the doctrine tend to depend on their specific facts.[4] Although petitioners contend that "[t]he Court of Appeals expressly clashed head-on with" *Williams & Wilkins* (*id.*), in fact the court distinguished that case on the ground "that the Court of

[4] 3 Nimmer on Copyright § 13.05[A] (1981).

Claims was primarily concerned about the serious damage to medical science that would result if it held for the plaintiff." (Pet. App. 16.) No such damage to science is threatened in the instant case.[5]

Moreover, the district court in the instant case correctly pointed out that *Williams & Wilkins* "has little precedential value. Its holding is specifically limited to its unique factual situation. Furthermore, it has been strongly criticized [citation to "*e.g.*, 3 Nimmer on Copyright § 3.05[E]"]. . . ." (Pet. App. 73 & n.2.)[6]

Finally, petitioners have not cited any case, apart from the decision of the district court below, that has joined *Williams & Wilkins* in holding that the copying of an entire work to perform the same function as that of the original is a fair use.[7] Therefore, it is fair to conclude that *Williams & Wilkins* is not exerting any influence on the point on which petitioners claim it differs from the decision of the Ninth Circuit below, and that consequently there is no conflict among the circuits warranting review by this Court.

C. Review by this Court at this Time Would Be Premature.

It is too early for this Court to review the issues raised by the instant case. Video recording technology is only now being introduced widely into commerce, and the cir-

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[5] Nimmer suggests a further distinction: "that the copyright owner may receive additional compensation by reason of off-the-air taping [and thus loses potential royalties] . . . while no such additional payment is forthcoming from photocopying." 3 Nimmer on Copyright § 13.05[E] at 13-87 n.119.1 (1981).

[6] On the limitation of *Williams & Wilkins* to the totality of facts uniquely present there, *see* 487 F.2d at 1362.

[7] Since it was decided in 1973, *Williams & Wilkins* has been cited only infrequently, and except in the district court in the instant case never in a manner that conflicts with the view of the court of appeals below that the copying of an entire work for the same purpose as the original is not a fair use.

cumstances of its use have not been fully delineated.[8] This is the first case to present the copyright issues created by video recorder technology, and the Court does not now have the benefit of consideration of those issues in a range of factual settings by different lower courts. Petitioners themselves emphasize (Pet. 6-7) that the record in the instant case is quite limited: it involves only 32 instances of "home recording of free off-the-air TV, by four Betamax owners"; and there was little evidence of the kinds of damage that home recording causes, although there was evidence of the use of recorders to build libraries (Pet. App. 43-48). Therefore, this record by itself does not provide the Court with the materials needed for a thorough and definitive exploration of all relevant aspects of the home recording copyright problem. The Court would be left to guess about the full dimensions of the technological practices it would be ruling upon, at least implicitly.

D. The Issue of Remedy Is Not Presented.

Finally, review of petitioners' fourth question presented—relating to the availability of a "compulsory license" as a remedy for infringement—would be premature at this stage. The court of appeals mentioned the possibility of a "continuing royalty," but has not ordered one in this case, nor has it even ruled that such a remedy would be appropriate. It has said merely that such a remedy "may very well be an acceptable resolution in this context" (Pet. App. 29), and it remanded the case to the district court "for a consideration of the appropriate relief." (Pet. App. 28-29.) Noting that "[t]he relief question is exceedingly complex," the court of appeals observed that "the district court is in a better position to resolve, in an appropriate fashion, [that]

[8] The district court noted: "The ramifications of this new technology are greater than the boundaries of this lawsuit." (Pet. App. 56.)

question." (Pet. App. 28.) Thus, there is no judgment relating to a continuing royalty (or "compulsory license") for this Court to review. Any review of that issue should await the imposition of a continuing royalty by the district court and the court of appeals (if that should occur), so that this Court could consider the remedy as actually formulated on a factual record, rather than as an abstract proposition. Nor is any issue of privacy or enforcement presented in the absence of a formulated remedy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD M. COOPER
(Counsel of Record)
WILLIAMS & CONNOLLY
Hill Building
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-3017
Attorneys for Motion Picture Association of America, Amicus Curiae

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Amicus Brief

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, *ET AL.*,

Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC.
AND
WALT DISNEY PRODUCTIONS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF RETAIL DEALERS OF AMERICA AS *AMICUS CURIAE*

JAMES M. GOLDBERG
ABRAMS, KOVACS,
WESTERMEIER & GOLDBERG, P.C.
1735 K Street, N.W.
Washington, DC 20006
(202) 785-2050
Attorneys for NARDA
as Amicus Curiae

Washington, D.C. • THIEL PRESS • (202) 638-4521

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BRIEF OF NATIONAL ASSOCIATION OF RETAIL DEALERS OF AMERICA AS *AMICUS CURIAE*

This brief is submitted with the written consent of all parties on file with the Clerk of this Court.

The National Association of Retail Dealers of America (NARDA), by its attorney, files this brief as *amicus curiae* supporting the position of Petitioners and respectfully urges this Court to issue a Writ of Certiorari to the

United States Court of Appeals for the Ninth Circuit to review the judgment entered in the above-captioned case.

INTEREST OF *AMICUS CURIAE*

The National Association of Retail Dealers of America is an Illinois corporation, chartered in 1943, which represents more than 3,600 member companies operating more than 14,000 retail outlets nationwide. The overwhelming majority of these companies are owner-operated and most have an annual sales volume of less than $750,000 per outlet. NARDA member companies sell a wide variety of hard goods, including home appliances, television sets, audio components, and video recorders, of the kind which are impacted by this case.

The subject matter of the instant case – whether home videotape recording of free off-the-air television programs is a copyright infringement – is a matter of substantial concern to NARDA, since many of NARDA's retail dealer members sell video cassette recorders and blank recording tape and find that it constitutes a growing share of their sales volume. Additionally, the question of whether the sale of a staple item of commerce constitutes a contributory infringement is of vital concern since vast potential liability could rest on these small hard-goods retailers. Further, if a copyright and/or a contributory infringement is found, any remedy could significantly impact sales of video cassette recorders and the income and profit generated by NARDA members.

The interest of NARDA is predicated upon the substantial and far-reaching consequences of any result in the instant case. The concern of the *amicus curiae* is that the Court, in formulating the principles to govern the particular dispute involved in the present case, should have the benefit of NARDA's views, which may not

otherwise be presented in the arguments of the parties, in order to be aware of the broader ramifications of its decision herein.

STATEMENT OF THE CASE

Petitioners, in their brief to this Court, have outlined the general principles applicable to the instant case. The United States Court of Appeals for the Ninth Circuit, in overturning a decision of the United States District Court for the Central District of California, found that off-the-air copying of telecasts of copyrighted audio-visual materials by owners of videotape recorders in their own home constituted copyright infringement and did not constitute fair use.

In addition, the Court of Appeals found that manufacturers and distributors of the videotape recorders were liable for contributory infringement in that they knew that the tape recorders would be used for such purpose and induced, caused, or materially contributed to the infringing conduct.

REASONS FOR GRANTING THE WRIT

In support of Petitioners' position, NARDA respectfully suggests that the Writ of Certiorari be granted for the following reasons:

(1) The Ninth Circuit erred in concluding that the videotape recorder was not a staple article of commerce because it was not "suitable for substantial noninfringing use."

(2) The Ninth Circuit erred in concluding that, even if the videotape recorder was not a staple article of commerce, manufacturers, distributors and retailers of that product were held to a per se standard of con-

tributory infringement in the absence of a showing of encouragement or inducement of infringement.

(3) The remedies suggested by the Ninth Circuit—i.e., statutory damages, injunction, damages or a continuing royalty—would have the effect of eliminating the video recorder from the marketplace, thus depriving the general public of an article of merchandise which has substantial benefit and which can be utilized for significant, if not substantial, noninfringing use.

THE VIDEO RECORDER IS A STAPLE ARTICLE OF COMMERCE

The argument that the video recorder is a staple article of commerce which is suitable for substantial noninfringing use and is therefore incapable of rendering its seller as a contributory infringer has its legal roots in 35 U.S.C. 271(c) which defines contributory infringement in a patent context and provides the "staple article of commerce" exemption.

This Court has long recognized this exemption, stating some 70 years ago, in *Henry v. A.B. Dick Co.*, 224 U.S. 1, 32 S. Ct. 364, 56 L. Ed. 645 (1912), that to hold otherwise would "block the wheels of commerce."

The District Court in this proceeding recognized the underlying rationale for this rule and applied it to the context presented by the sale and use of the videotape recorder. The development of new and important items of commerce, such as the videotape recorder, would be hampered, and perhaps even stymied, if manufacturers and retailers were held liable for contributory infringement by some theory of "constructive" knowledge which was applied to their distribution and sale of the item in question.

It is therefore contended that the District Court was correct in stating that

> Selling of a staple article of commerce—e.g., a typewriter, a recorder, a camera, a photocopying machine—technically contributes to any infringing use subsequently made thereof, but this kind of "contribution," if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management.

Not only did the Ninth Circuit err in deeming this statement "inappropriate," but it further erred in declaring that because videotape recorders are manufactured, advertised and sold "for the primary purpose" of reproducing television programs (virtually all of which is copyrighted material), therefore that such recorders were not "suitable for substantial noninfringing use" within the context of 35 U.S.C. 271(c). The Ninth Circuit's conclusion is faulty in two respects: (1) merely because an item is manufactured for a "primary" purpose does not necessarily mean that it is not capable of a "substantial" other use; and (2) that Court overlooked the factual material presented and the fact that, by any measurement, the videotape recorder is in fact capable of, and is being utilized for, many purposes which do not constitute copyright infringement, even assuming the validity of the Ninth Circuit's other conclusions about off-the-air recording in the home.

In connection with the first contention, it should be noted that the Webster's Third International Dictionary defines "primary" as "first in order, rank or importance" while defining "substantial" as "important, essential." It is thus clear that while an item may have a "primary" purpose, it is also capable of having "substantial" other uses.

While one of the major uses of a video recorder may be in the context of "time shifting"—that is, recording a program broadcast at a time which is inconvenient for a particular viewer to watch it and replaying it at a time which is more convenient—video recorder manufacturers, retailers and purchasers are indeed aware of the substantial noninfringing uses which can, and are, being made of this item.

For example, one needs only to visit virtually any major shopping center or retail outlet area in this country and one will find a merchant selling and/or renting motion pictures whether the kind shown originally in movie theaters or the so-called "documentary" or educational material which is seldom distributed through theaters) which have been recorded onto videotape cassettes for use in video recorders.

The producers of these motion pictures, most of which are copyrighted, have provided retailers and, through them, the general public, with a general license to use the copyrighted material without constituting an infringement.

Thus, the in-home playback of motion pictures, whether the pictures are purchased for permanent retention or rented for temporary enjoyment, constitutes a growing, and in the contention of the *amicus curiae*, a "substantial noninfringing use" of the video recorder.

Additionally, an increasing number of video recorders are being sold with an optional video camera as an accessory. This camera, which is gradually replacing the home motion picture camera, is being utilized by consumers to make their own in-home tapes, whether of birthday parties, family gatherings, vacation sights, children's activities or other important events. These self-recorded tapes can and are being stored and later

played back on video recorders in much the same manner that still photographs or "home movies" were formerly enjoyed by families.

Thus, an indispensible element of this phenomenon of self-recording and later playback, the video recorder is indeed capable of "substantial noninfringing use."

RETAILERS SHOULD NOT BE HELD TO A PER SE STANDARD OF CONTRIBUTORY INFRINGEMENT

The Ninth Circuit was in error in concluding that the manufacture and distribution of the videotape recorder was to be considered as a per se contributory infringement, even if one assumes that the video recorder is not entitled to exemption under the "staple article of commerce" theory discussed above.

In so concluding, the Ninth Circuit disregarded both precedent established by this Court and the intent of the congress of the United States expressed in reports accompanying the Copyright Revision Act of 1976, 17 U.S.C. 101 et seq.

In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), cited also in *Midwest Video Corporation v. F.C.C.*, 571 F.2d 1025 (1978), this Court stated, in discussing the liability of cable television systems, that

> . . . mere quantitative contribution cannot be the proper test to determine copyright liability. . . . If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement—not only the apartment house owner who erects a common antenna for his tenants, but *the shopkeeper who sells or rents television sets*, and, indeed, every television set

> manufacturer. Rather resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception. [Emphasis added.]

This Court went on to state (392 U.S. at 399) that "essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals. . . ."

The Ninth Circuit has thus misapplied this Court's determination of what activity constitutes copyright infringement. The mere supplying of the video recorder, a quantitative contribution, is not the proper test to apply, just as the proper test in *Fortnightly* was not the mere sale of the television receiver.

And the sale of the video recorder, like the delivery of a cable signal in *Fortnightly*, merely enhances the viewer's ability to watch the copyrighted program broadcast by the television station, by enabling that viewer, under certain conditions, to temporarily store the program for later watching.

The Ninth Circuit's interpretation is particularly inappropriate when viewed in the context of the Copyright Revision Act of 1976. Both the Senate and House Committee reports accompanying the bill which subsequently became that Act stated:

> . . . To be held a related or vicarious infringer in the case of performing rights, a defendant must actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commercial gain from the operation and either direct or indirect benefit from the infringing performance.

Senate Report, P. 141-142; House Report, P. 159-160.

This dual test of control and financial or commercial gain is well recognized. *Shapiro, Bernstein & Co. v. H. L. Green & Co.*, 316 F.2d 304 (2d Cir. 1963); *Davis v. DuPont de Nemours*, 240 F. Supp. 612 (S.D.N.Y. 1965); *Roy Export Co. v. Trustees of Columbia University*, 344 F. Supp. 1350 (S.D.N.Y. 1972).

In this case, neither the manufacturer nor the retailer of the video recorder have any control over the use to which the machine is placed. While both receive revenue from the sale of the equipment, such financial gain is received prior to the equipment being put to use, and neither receives any financial benefit from the use to which the recorder is put.

SUGGESTED REMEDIES WOULD ELIMINATE THE VIDEO RECORDER FROM THE MARKETPLACE

In its discussion of the relief to be granted in this case, the Ninth Circuit noted that "the relief question is exceedingly complex." Indeed, this might have been the strongest understatement of the court's opinion.

The Ninth Circuit remanded with an indication that the District Court choose a remedy from among statutory damages, an injunction, damages or a continuing royalty. Each of these remedies would have the effect of severely hampering the further technological development of the video recorder which, as has been discussed herein, is capable of a variety of noninfringing uses.

Demand for the product is price-related, and the imposition of monetary penalties on the manufacture and sale of the recorder, whether in the form of statutory damages, damages or a continuing royalty, would sharply curtail demand, thus reducing the revenues and

profits derived by hard-goods retailers, many of whom are small businessmen and who have used this equipment as a means of generating income during an otherwise dismal economic period.

CONCLUSION

For the reasons set forth herein, the National Association of Retail Dealers of America, as *amicus curiae* in support of Petitioners' position, respectfully urges this Court to issue a Writ of Certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

JAMES M. GOLDBERG
ABRAMS, KOVACS,
WESTERMEIER & GOLDBERG, P.C.
1735 K Street, N.W.
Washington, DC 20006
(202) 785-2050

Attorneys for NARDA
as Amicus Curiae

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vs.

UNIVERSAL CITY STUDIOS, INC.

and

WALT DISNEY PRODUCTIONS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL RETAIL MERCHANTS ASSOCIATION, AS *AMICUS CURIAE,* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PETER R. STERN
BERGER, STEINGUT, WEINER
FOX & STERN
150 East 58th Street
New York, New York 10155
(212) 980-1400
Attorneys for Amicus Curiae

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In The

Supreme Court of the United States

October Term, 1981

Sony Corporation of America, et al.,

Petitioners,

vs.

Universal City Studios, Inc.
and
Walt Disney Productions,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

BRIEF OF NATIONAL RETAIL MERCHANTS ASSOCIATION AS AMICUS CURIAE

The National Retail Merchants Association ("NRMA") submits this brief as amicus curiae, pursuant to Supreme Court Rule 36.1, in support of the petition of Sony

Corporation, Sony Corporation of America, Carter Hawley Hale Stores Inc., Associated Dry Goods Corporation, Federated Department Stores, Inc., Henry's Camera Corporation, and Doyle Dane Bernbach Inc. (sometimes referred to collectively as "Sony") that this Court grant a writ of certiorari to the Court of Appeals for the Ninth Circuit to review the far-reaching decision in Universal City Studios, Inc. v. Sony Corporation of America, 659 F.2d 963 (9th Cir. 1981).

While NRMA believes there are numerous grounds on which the decision of the Court of Appeals should be reversed, this brief will deal only with the Court of Appeal's erroneous holding that the petitioner retailers of Sony videotape recorders ("VTRs") -- machines which, as the district court found below, are used for many

unquestionably legitimate purposes -- were liable as contributory infringers for the allegedly infringing activities of consumers. NRMA submits that this Court should grant certiorari to consider the many issues raised in Sony's petition, including the issue of whether retailers should be held contributorily liable under the circumstances of this case.

This brief is submitted with the written consent of all parties on file with the Clerk of this Court.

The Interests of Amicus Curiae

NRMA is a non-profit, voluntary trade association whose over 3,500 corporate members operate more than 35,000 department, chain and specialty stores throughout the nation. Many of NRMA's members sell consumer electronic equipment, in-

cluding VTRs and video cassettes, and are therefore vitally affected by the issues raised by this case, which have ramifications that reach far beyond the parties to this matter.

In fact, NRMA's members include three of the four retailer defendants -- Carter Hawley Hale Stores, Inc., Associated Dry Goods Corporation, and Federated Department Stores, Inc. -- which were found contributorily liable for alleged infringements committed by consumers using VTRs for non-commercial purposes.

NRMA submits that the Court of Appeals erred in concluding that consumers who recorded the plaintiffs' works committed copyright infringement. As Sony points out in its petition, and as the district court concluded, such activities should be deemed fair use of the plaintiffs' works.

NRMA further submits that the Court of Appeals erred in broadening the scope of the doctrine of contributory infringement, particularly with respect to the liability of sellers of goods capable of many noninfringing uses. NRMA therefore urges on behalf of its members that this Court review the decision of the Court of Appeals.

Summary of Argument

The decision of the Ninth Circuit, in extending the doctrine of contributory infringement to retail sellers of VTRs, is clearly erroneous in that:

(1) it misapplied the applicable legal standards including the analogous patent law principle under which VTRs should be deemed staple articles of commerce because, as the district court found,

they are capable of being used for many noninfringing and legitimate purposes; and

(2) it ignored the factual findings of the district court that the retailers a) did not know and had no reason to know that their customers would infringe the copyrights in plaintiffs' works, and b) neither induced nor encouraged the allegedly unlawful copying.

ARGUMENT

I. VTRs are Articles of Commerce Capable of Substantial Non-Infringing Uses.

The Court of Appeals held that the plaintiffs' copyrights in 32 works were infringed by consumers who used their VTRs to record the works for later viewing (a practice called "time-shifting" because it allows a consumer to rearrange broadcast schedules to suit his convenience). Further, the Court of Appeals summarily held

that the manufacturer, distributor, advertising agency and four retailers of Sony's Betamax brand VTR were contributorily liable for the infringements.[1] In so holding, the Court of Appeals reversed the well-reasoned decision of the district court, which had held that a consumer's recording for at home, noncommercial viewing at a later time was not copyright infringement and that, even if it were, the sellers of VTRs would not be contributorily, vicariously or directly liable for the infringement.

The district court's holding was premised, at least in part, on its conclusion that VTRs are staple articles of commerce

1. The Court of Appeals agreed with the district court that the retailers' copying of portions of plaintiffs' works in order to demonstrate the capability of the VTRs was not a copyright infringement.

capable of many noninfringing uses. The Court of Appeals erroneously reversed.

Contrary to the view of the Court of Appeals, the patent law concept of "staple article of commerce" embodies a principle clearly analogous here -- a manufacturer or seller should not be held contributorily liable for infringement if the goods are capable of substantial noninfringing uses. Thus, there can be liability only if the defendant had knowledge that the use of the product would infringe a patent because the product was unsuitable for noninfringing uses.

Accordingly, in Aro Manufacturing Co. v. Convertible Top Replacement Co., Inc., 377 U.S. 476 (1966), this Court found contributory patent infringement liability because the manufacturer of automobile convertible top replacement fabrics knew

that its product was suitable for use only in certain automobile convertible tops which infringed a patent. A majority of the Court there stressed that a finding of contributory infringement was appropriate only if the contributory infringer knew that the intended use would infringe a particular patent. See Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176 (1980).

In Henry v. A.B. Dick Company, 224 U.S. 1, 48 (1911), overruled on other grounds, Motion Picture Patents Co. v. Universal Films Manufacturing Co., 243 U.S. 502 (1917), the Court explained the reasoning underlying the staple article of commerce principle:

> [A] sale of an article which though adapted to an infringing use is also adapted to other and lawful uses is not enough to make the sel-

> ler a contributory infringer. Such a rule would block the wheels of commerce. There must be an intent and purpose that the article sold will be so used. Such a presumption arises when the article so sold is only adapted to an infringing use.

For the same policy reasons, this principle should be applied in copyright cases. Whereas a patent confers a monopoly for a limited time on the manufacture, use or sale of patented equipment, a copyright merely gives an author the exclusive right to a particular expression of an idea. As it would be an unwarranted broadening of patent rights to hold, for instance, a seller of an article that can be put to substantial noninfringing uses liable for patent infringement, so would it be an unwarranted extension of copyright rights to hold liable for contributory infringe-

ment a seller of an article that can be used for many purposes other than illegal copying.

The Court of Appeals misapplied the staple article of commerce standard in holding that a VTR is not a staple article of commerce. Indeed, the record below was replete with evidence showing the many uses to which VTRs can be put without any problem of copyright infringement -- such as recording and viewing uncopyrighted material, recording and viewing material as to which the copyright owner has consented, viewing home movies recorded on a video camera, and viewing prerecorded tapes of various works.[2] Since VTRs are

2. See, e.g., R.T. 1742-3, 1769, 2300-1, 2328-9, 2436-7, 2442-8, 2481-7, 2511-6, 2540-52, 2564-87, 2593-2606, 2615-6, 2623-40, 2823-44, 2863-2902, 2912-23, 2929-39, 3007-18; Def. Exh. OT, PD, PE, PF, PG, PH, PI, PK.

capable of all these noninfringing uses, they are staple articles of commerce and sellers of VTRs should therefore not be held liable for contributory infringement.

II. The Court of Appeals Ignored the Factual Findings of the District Court

The decision of the Court of Appeals, which holds the retailer liable when the retailer merely sold VTRs capable of many legitimate, noninfringing uses, is an unprecedented expansion of the doctrine of contributory infringement. Both the Court of Appeals and the district court agreed that a "contributory infringer" is "one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another." Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443

F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted).

Applying this standard, the district court held that the manufacturer, distributor and retailers of VTRs were not contributory infringers, due to their lack of knowledge of the infringing activity and to the absence of evidence showing that they "in any way induced or caused to be made any of the copies at issue." (Petitioners' Appendix at 93-4). The district court further noted that the corporate defendants "have neither the right nor the ability to control Betamax purchasers' use of the machine in their homes." (Pet. App. at 98). The Court of Appeals ignored these factual findings and held, without evidentiary support, that retailers possessed the requisite knowledge and that "there is no doubt that appellees have met

the other requirements for contributory infringement --inducing, causing, or materially contributing to the infringing conduct of another." (Pet. App. at 27).

In addition to ignoring the district court's findings of fact, the Court of Appeals also misconstrued the legal standards for contributory infringement, as developed by this Court and lower courts. The relevant cases demonstrate that a defendant can be held liable for contributory infringement only if he knew or should have known that the specific infringement was occurring and specifically caused or orchestrated the infringing activity.

Thus, for instance, in Kalem Co. v. Harper Brothers, 222 U.S. 55 (1911), the defendant made a movie based on the copyrighted novel Ben Hur and sold the film to jobbers. It was found contributorily

liable for the infringement that occurred when the movie was exhibited in theaters to which the jobbers had sold it, because the defendant expected and intended that the specific infringing activity would occur.

Moreover, as demonstrated in Universal Pictures Co., Inc. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947), a contributory infringer must be directly linked to the infringing act and know of it in order for liability to arise. In that case, a scriptwriter was held liable, as a contributory infringer, for his participation in writing the screenplay for a movie which infringed plaintiff's copyright. The writer knew that the infringement would occur, as he had copied from the copyrighted work in writing the screenplay.

Similarly, in Gershwin Publishing Corp. v. Columbia Artists Management,

Inc., 443 F.2d 1159 (2d Cir. 1971), a company which managed concert artists and organized concerts was held contributorily liable for the infringements committed by the concert artists. Central to the finding of infringement was the conclusion that the defendant helped to plan the concert programs and therefore knew the specific infringing works that would be performed.

Under the standards developed in the above-cited cases, a defendant will be held liable for contributory infringement if the factual circumstances demonstrate that he knew or had reason to know that the primary activity infringed plaintiff's copyrighted works and materially aided the infringing activity. Yet, the record in this case is bare of any evidence showing that any of the corporate defendants in-

tended or knew that consumers would use the VTRs to copy Universal's or Walt Disney's works, or encouraged copying of the plaintiffs' works.

Retailers have no control over or knowledge of the particular uses to which consumers put goods they have purchased and should not be held liable, merely because they sold goods which consumers in the privacy of their homes might conceivably use for infringing activities. Under the Court of Appeals' flawed reasoning, sellers of cameras, photocopying machines and typewriters would be exposed to liability for copyright infringements committed by users of these machines.

Conclusion

For the above reasons, NRMA respectfully urges this Court to issue a writ of certiorari to the Court of Appeals for the

Ninth Circuit, in order to review the failure of the court below to consider the factual findings of the district court and to properly apply them to the applicable legal standard.

Respectfully submitted,

Peter R. Stern
Berger, Steingut, Weiner,
Fox & Stern
150 East 58th Street
New York, New York 10155
(212) 980-1400

May 7, 1982

Attorneys for National
Retail Merchants
Association

Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, et al.,

Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC., and
WALT DISNEY PRODUCTIONS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE PFIZER INC. IN SUPPORT OF PETITION

STEVEN C. KANY
(*Counsel of Record*)
235 East 42nd Street
New York, New York 10017
Attorney for Amicus Curiae
Pfizer Inc.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE PFIZER INC. IN SUPPORT OF PETITION

Amicus Curiae Pfizer Inc. ("Pfizer") respectfully requests that the Writ of Certoriari prayed for by Petitioners Sony Corporation of America, *et al.*, be issued to reivew the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on October 19, 1981, *Universal City Studios, Inc., et al.* v. *Sony Corporation of America, et al.*, 659 F. 2d 963 (9th Cir. 1981).

The parties to this proceeding have filed with the Court a joint consent to the submission of briefs of amici curiae, a copy of which is reproduced in the Appendix.

Interest of the Amicus Curiae

This action, the "Betamax Case", is certainly the most famous and one of the most important copyright cases ever decided. In holding non-commercial home recording of television programs to be a violation of the copyright laws, the court below has produced consequences that extend into the privacy of millions of homes and threaten a large segment of the national enconomy.

The interest of amicus curiae Pfizer Inc. arises out of its production and sale of magnetic particles used in the manufacture of electronic recording tapes, including videotapes. Because of its technological expertise in the rapidly growing electronic recording industry, Pfizer has found this business segment sufficiently attractive to justify the investment, over the past three years, of more than eighty million dollars in construction of new and expanded research and production facilities in Easton, Pennsylvania, Valparaiso, Indiana, and East St. Louis, Illinois. At a time when the national average unemployment rate has reached 9%, these facilities employ more than 350 workers in locations suffering even greater recession. Unemployment exceeds 11% in Easton, 14% in Valparaiso, and in East St. Louis, Pfizer is the last major employer still in business.

What television viewers use videotapes made with Pfizer's components for—time-shifting, archiving, home movies, pre-trial testimony—is immaterial to Pfizer and something over which it has no control. What does concern Pfizer, however, is the very real possibility that it might be forced to stand by, helpless and entirely innocent, while the dispute at bar, involving a small number of parties, representng narrow industry segments, involving no real claims of injury, threatens to produce economic disruptions extending to Pfizer and to thousands of workers throughout the nation and the world.

Pfizer's interest, therefore, is that of protecting its investment by urging this Court to apply the Copyright Act, 17 U.S.C., with the flexibility intended by Congress, in order to promote the goals intended by the Constitution, in the context of a real marketplace in a real recession, rather than in the theoretical and unbending way approved by the court below.

Statement of the Case

This case involves the non-commercial home recording of copyrighted television programming by the use of videotape recorders ("VTRs") manufactured, sold, and advertised by Petitioners. This rapidly growing field has won wide acceptance by the viewing public because it allows through its principal use, time-shifting, a greater freedom and flexibility in gaining access to information and entertainment.

Respondents, producers of copyrighted television programs, allege that all off-the-air recording of their programs constitutes a violation of their copyrights, for which they are entitled to relief. Respondents' evidence at trial apparently showed no actual injury, but they have urged, nonetheless, that they are entitled to an injunction prohibiting all arguably infringing home recording or to statutory damages or an accounting of Petitioners' profits, all or any of which would likely put Petitioners out of business, and would severely affect amicus curiae Pfizer Inc. as well as hundreds of other related or dependent businesses.

Because the individuals who are actually involved in recording copyrighted television programming (or in the many other, clearly noninfringing uses of VTR equipment) are not readily identifiable or susceptible to suit without enormous expense and massive invasions of privacy, Respondents sued the more compact target of the manu-

facturers, sellers and advertisers of VTR equipment, charging them with contributory infringement.*

Respondents argue that in spite of the fact that they have prospered since the advent of the VTR era, home video recording does inflict at least a theoretical injury—that time-shifting, recording a program for viewing at a later time, would pre-empt the viewing of a later program; that archiving will result in smaller audiences for broadcast reruns, which will in turn reduce advertising revenues, and thus lower the prices Respondents can command for copyrighted programming; and that archiving will also result in smaller audiences for later theater revivals of recorded broadcast films.

The District Court made extensive findings of fact, concluding that the first argument is illogical; the second contradicted by Respondents' trial evidence; and the third entirely speculative. Because of the lack of proof of injury to Respondents, the impossibility of equitable enforcement as against those who are actually recording off the air, and the drastic economic and social consequences of squelching an entire industry, the District Court held noncommercial home recording to be a fair use of the copied materials. *Universal City Studios, Inc., et al.* v. *Sony Corporation of America, et al.*, 480 F. Supp. 429 (C.D. Cal. 1979).

The Court of Appeals for the Ninth Circuit reversed, 659 F. 2d 963 (9th Cir. 1981), giving no weight to Respondents' lack of any injury, no weight to the drastic social and economic consequences of its holding, no weight to Congress' intent to provide a broad and flexible fair use exemption, and no weight to the policy of the Copyright

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* A similar action against most of the other videotape and VTR equipment manufacturers and advertisers is now pending in the District Court. *Universal City Studios, Inc.* v. *RCA Corporation, et al.*, 81 Civ. 5723 (C.D. Cal., filed November 6, 1981).

Clause to promote the progress of science and the useful arts. Instead, the court insisted on a technical and literal application of the Copyright Act with inequitable and potentially disastrous consequences.

Reasons for Granting the Writ

This Court should grant a writ of certiorari to review and reverse the decision of the Court of Appeals on two important aspects of copyright law—the scope of "fair use" under 17 U.S.C. § 107 and the appropriate remedy, if any, for a non-injurious infringement where the granting of any of the remedies sought by Respondents, permitted by statute, or suggested by the Court of Appeals will cause widespread social and economic disruption. The case presents, in the most dramatic way conceivable, the collision between the "irresistible force" of technological progress and the "immovable object" of the literal language of the Copyright Act, 17 U.S.C.

Denial of certiorari will leave in effect a circuit precedent and a persuasive nation-wide authority that so narrows the definition of fair use as to (a) stifle an entire industry, one of the few flourishing segments of the national economy otherwise in widespread recession; and (b) suppress the primary goal of the Copyright Clause, U.S. Const., Art. I, § 8, cl. 8, to promote "the progress of science and useful arts" in the form of VTR technology. The decision will grant to Respondents and other television program copyright owners a control over their works greater than necessary to encourage "the progress of science and the useful arts" in the form of such programs, and an unneeded and undeserved remedy that will do the maximum harm to Petitioners and the public, while redressing no actual injury.

POINT I

Because non-commercial home recording of free, publicly broadcast television programming promotes the progress of science and the useful arts and inflicts no harm on respondents, it should be held to be a fair use.

The Copyright Act, 17 U.S.C. § 101, *et. seq.*, was promulgated under the Copyright Clause of the Constitution, Art. I, § 8, cl. 8, which empowers the Congress "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and Discoveries . . ." This case involves two aspects of science and the useful arts—Respondents' television programming *and* Petitioners' VTR technology.

Numerous cases have emphasized the focus of the Copyright Clause on the common weal, rather than on the private gain of authors and inventors. Thus, in *Meeropol* v. *Nizer*, 417 F. Supp. 1201, 1206 (S.D.N.Y. 1976), the court observed that:

> "there are occasionally situations in which the copyright holder's interest in a maximum financial return must occasionally be subordinated to the greater public interest in the development of art, science, and industry."

The virtually identical language was used in *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 307 (2d Cir. 1966), quoting *Berlin* v. *E.C. Publications Inc.*, 329 F. 2d 541, 544 (2d Cir. 1964).

Similarly, in *Williams § Wilkins Company* v. *United States*, 487 F. 2d 1345, 1352 (Ct. Cl. 1973), *aff'd by equally divided Court*, 420 U.S. 376 (1975), the Court of Claims

reiterated the recommendation of the House Committee that drafted the 1909 Copyright Act, that:

> "copyright was '[n]ot primarily for the benefit of the author, but primarily for the benefit of the public.' H.R. Rep. No. 2222, 60th Cong., 2d Sess., p. 7. The Supreme Court has stated that 'The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.' *Mazer* v. *Stein*, 347 U.S. 201 . . ."

Monopolies were no more favored at the time the Constitution was drafted than they are today. The Copyright Clause permits the Congress to act in spite of that disfavor in order to encourage the arts and sciences where such an incentive may be deemed necessary. The Congressional power to grant a monopoly does not, however, give rise to an unlimited corresponding right in authors and inventors to maintain or to profit from such a grant at the expense of the public values that are the primary focus of the Constitutional authority. Rather, the monopoly is at all times subject to those public values, especially in a case such as this one in which the public benefit flowing from VTR technology far outweighs any impairment of copyright owners' property rights.

This sort of balancing of equities forms the logic and policy underpinning of the doctrine of fair use. A fair use exemption was first implied by courts faced with the impossibility of giving full effect to the apparently absolute nature of the rights granted to copyright owners, and was later codified in Section 107 of the Copyright Act of 1976, 17 U.S.C. § 107. The common and traditional definition of fair use has been one which involves a derivative or partial or scholarly or insignificant use designed to stimulate thought, to promote discussion, and otherwise to vindicate generally the social values of both the Copyright Clause and the First Amendment.

The list of adjectives in the preceding sentence provides another test traditionally used for determining the fairness of a particular use as one that is so insubstantial as to inflict no harm on the copyright owner while promoting those same public values. Seen in this light, non-commercial home recording ought to be regarded as fair use because the viewer gains greater access to programming through time-shifting, or, at most, nothing that could not be provided by a good memory; while the copyright owner loses nothing that he did not expect to lose by authorizing free broadcast and unrestricted home reception of the copyrighted material.

The tests for fair use contained in Section 107 of the Copyright Act are most readily applicable to the most traditional medium—print. With varying degrees of wrenching or stretching the statutory fair use tests can be applied to works in other media, but the process is most strained when the subject is a work that is apprehended visually—instantaneously and as a whole—such as a statue or a painting, rather than linearly or in parts, such as a printed text. Thus, a short quotation for fair use in a review might involve a paragraph from a book; but how does one make similarly limited use of a statue or painting? Does a short quote consist of a bronze arm, or eight square inches from the upper left quadrant of a painting; or is it the entire statue or painting, but seen only for a moment, or in miniature, or in monochrome?*

Visually apprehended materials, including television broadcasts, must be treated differently from books because they are received differently by their audience. Forbidding the non-commercial home recording of a television broad-

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* This analysis, calling for differing standards of fair use varying with the medium in which a copyrighted work is produced, is undertaken more fully in S. Timberg, "A Modernized Fair Use Code for the Electronic As Well As the Gutenberg Age", 75 *Nw. U.L. Rev.* 193, 203-16 (1980).

cast so that the viewer or his family can see it later or see it again is most analogous to forbidding the purchaser of a book to reread it or to allow others in his family to read it. Home recording would be analogous to infringing activities such as copying or republishing a book only if it involved rerecording, or selling or leasing the copy, or showing it or rebroadcasting it commercially. But the home television recorder's activity in this case is, by definition, private and non-commercial and is thus more analogous to rereading a page or a chapter of a book, or merely putting off reading the book until sometime after purchasing it, none of which has ever been regarded as a copyright infringement.

Much has been said about the implied exemption for non-commercial home video recording suggested by the various statements of witnesses and legislators during the hearings and debate on the 1971 amendment. *See, e.g.,* Petitioners' Appendix at pp. 7-12 (Court of Appeals), and 58-65 (District Court). Whether or not the Congress specifically enacted home audio or video recording exemptions, and whether or not the rules of statutory construction permit the extension of an implied exemption for home audio recording to later non-commercial home video recording, one fact does emerge clearly: the sense of the Congress, when faced with the prospect of regulating or banning activities within the home, was to place a greater value on privacy than on technically perfect or complete enforcement of the copyright laws.

The choice of privacy over enforcement was made less difficult by the fact that the activity in question was by definition non-commercial, and thus unlikely to inflict any real harm on copyright owners. This congressional consensus is not, of course, necessarily binding on the courts verbatim; but it does provide a persuasive guide that this Court can as easily and as logically follow, consistently with other social policy goals, in determining the scope of fair use under Section 107.

Given the private and non-commercial nature of the copying at issue in this case, application of the four factors contained in the Section 107 fair use test should produce a result favorable to Petitioners, to the viewing public, and to other members of the public and industry, including amicus curiae Pfizer Inc.:

1. The purpose and character of the use (17 U.S.C. § 107 (1)) is in no way designed to harm respondents or to profit at their expense or to do anything other than to receive and view—perhaps later, perhaps more than once —programs broadcast freely and without restriction for just such reception and viewing.

2. The nature of the copyrighted work (17 U.S.C. § 107 (2)) is one which is freely broadcast for unrestricted reception by anyone possessing a television set, without limitation and without charge,* and one which produces a greater benefit to Respondents with a wider audience.

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole (17 U.S.C. § 107(3)) is, of course, virtually entire. But as Judge Wyatt made clear in *Time Incorporated* v. *Bernard Geis Associates*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968), in discussing the substantial use found not to be a fair use in *Folsom* v. *Marsh*, 9 Fed. Cas. 342, No. 4901 (C.C. Mass. 1841), the mere fact that the proportion of the whole used was substantial is not the controlling factor; rather, "the test of fair use was primarily the degree of injury to the plaintiff." The amount and substantiality of the *use* made of the copyrighted material, whatever fraction of the whole may be involved, is a far more meaningful reading of the statutory test when applied to visually apprehended

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* The public does pay for access to programming through higher prices for goods advertised on television networks. *See*, Point II, *infra*, at 13.

materials in the non-commercial home video recording context, where it is nearly zero. Such use is no more than what was intended by Respondents—free and unrestricted home reception. In any event, as the Court of Claims stated in *Williams & Wilkins Company* v. *United States, supra,* 487 F. 2d at 1353: "There is, in short, no inflexible rule excluding an entire copyrighted work from the area of 'fair use.'"

4. Finally, the effect of the use on the potential market for or value of the copyrighted work (17 U.S.C. § 107 (4)) is virtually nil, as shown by Respondents' own trial evidence and by continued uncomplaining payment by advertisers for commercial television time, without adjustment for the supposed effects of home videotape libraries. Indeed, because the time-shift use of video recording actually *increases* the viewing audience, and far outweighs other allegedly infringing uses, the videotape recording industry provides a net benefit to Respondents, and another reason for characterizing such recording as a fair use. *See, Time Incorporated* v. *Bernard Geis Associates, supra,* 293 F. Supp. at 146.

Application of the statutory tests for fair use in this way may require some innovation; but that is entirely consistent with the House Committee's caution that it had "no disposition to freeze the doctrine [of fair use] in the statute, especially during a period of rapid technological change." H.R.Rep. No. 89, 90th Cong., 1st Sess., at 32 (1967). On the contrary, this case provides an extraordinarily apt vehicle for employing the fair use provisions in precisely the manner and spirit envisioned by the Congress, required by the Constitution, and compelled by the realities of technological advance.

POINT II

None of the remedies suggested by the Court of Appeals or by the statute is necessary or appropriate for regulating non-commercial home video recording, but imposition of any of them would inflict irreparable injury on petitioners, Amicus Curiae, and the public.

The Copyright Act sets out a variety of remedies for infringement, including injunction (§ 502), impoundment and destruction or forfeiture of infringing articles (§§ 503, 509), actual damages and/or profits (§ 504(b)), statutory damages ranging from $250 to $50,000 (§ 504(c)), costs and attorneys fees (§ 505), or, in certain limited circumstances, a royalty payable on a compulsory license (§ 801) for certain phonorecords (§ 115), public performances (§ 116), or non-commercial broadcasts (§ 118) of certain nondramatic literary or musical works. Application of any of these remedies, or of the compulsory license and continuing royalty scheme suggested by the Court of Appeals, would be inappropriate, counterproductive, and unfair for the following reasons:

The statutory compulsory licensing and royalty provisions are all inapplicable on their face to the facts in this case, while the compulsory license and royalty suggested by the court below are neither authorized by the statute nor susceptible to full or fair implementation.

The non-commercial home recording activities at issue should be held to be a fair use, as shown by Point I above, and thus exempt from the reach of or the necessity for any of the Copyright Act's remedy provisions. *See, e.g., Williams & Wilkins Company* v. *United States,* 487 F. 2d 1345 (Ct. Cl. 1975), *aff'd by equally divided Court,* 420 U.S. 376 (1975); *Rosemont Enterprises, Inc.* v. *Random House, Inc.,* 366 F. 2d 303 (2d Cir. 1966); *Meeropol* v. *Nizer,* 417 F. Supp. 1201 (S.D.N.Y. 1976); *Time Incorporated* v. *Bernard Geis Associates,* 293 F. Supp. 130 (S.D.N.Y. 1968).

Alternatively, non-commercial home recording and playback for time-shift purposes should be held to fall within the Section 110(5) exemption, 17 US.C. § 110(5), again obviating the need for or the appropriateness of any remedy. Indeed, because the practice at issue involves a *private* reception, the Section 110(5) exemption should apply *a fortiori*, as being well within the "outer limits" of permissible conduct described in *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975), and explained in the House Judiciary Committee's gloss on the Copyright Revision Act, H.R.Rep. No. 94-1476, reported in 17 U.S.C.A. at 145, 149.

Respondents have not been harmed by non-commercial home recording; indeed, such recording for time-shifting, which all parties' evidence showed to be the principal use of VTR's, actually confers a benefit on Respondents in the form of a wider audience for their programming (and accompanying advertisements) than would otherwise be the case. The economics of television programming and viewing should not be obscured by the interposition of the network broadcaster between the program producer and the viewing public. The public pays for its access to copyrighted programming in the form of higher prices for the goods advertised on the broadcasting networks that purchase Respondent's copyrighted productions.

By contrast, imposition of an injunction or any of the other remedies sought by Respondents, authorized by statute, or suggested by the Court of Appeals, would inflict irreparable harm on Petitioners and thousands of others, including amicus curiae Pfizer Inc. This tipping of the balance of the equities away from Respondents is another reason for refusing to permit the imposition of a drastic and unneeded remedy. *See, e.g., Consumers Union of U.S., Inc.* v. *Theodore Hamm Brewing Co.*, 314 F. Supp. 697 (D. Conn. 1970).

The drastic effects of the remedies sought by Respondents and suggested by the court below take no account of

the many uses of VTR technology that cannot be claimed to be infringing—including numerous forms of clearly non-infringing off-the-air recording—that would also be eliminated along with the non-commercial home recording at issue here. This overkill results from Respondents' aiming their attack at Petitioners, rather than at the individual users of VTR equipment. That Respondents' strategy necessarily includes the baby along with the bath water demonstrates the impossibility of enforcing the law fairly in accordance with their prayer for relief.

Moreover, both the non-commercial home recording activities here at issue and all of the other, non-infringing uses for video recording technology, themselves represent the "progress of science and the useful arts." U.S. Const., Art, I, § 8, Cl. 8. The public good to be derived from this progress is threatened by the Court of Appeals' decision, whereas the aspect of such progress represented by Respondents' copyrighted television programming is neither threatened nor impaired by non-commercial home video recording. One form of progress of science and the useful arts ought not to be sacrificed to another by imposition of a destructive remedy when both could flourish. *See, e.g., Time Incorporated* v. *Bernard Geis Associates,* 293 F. Supp. 130 (S.D.N.Y. 1968).

The widespread and entirely unnecessary social and economic consequences of a decision that threatens the very existence of an entire industry, and the thousands of workers it employs in the midst of a recession, should be given at least as much weight as a matter of public policy as the narrower policy to be vindicated by upholding the literal language of the Copyright Act.

Finally, where, as here, the legal conclusion that non-commercial home recording activities constitute infringement is both close and novel, involving substantial legal arguments based on the statute, especially 17 U.S.C. § 107;

the legislative history, *e.g.*, Petitioners' Appendix at pp. 7-12, 58-65; case law, *e.g.*, the District Court decision in this action and the cases cited at p. 12, *supra;* and the Constitution, Art. I, § 8, cl. 8, resolution of the issue for the first time, wholly unexpectedly, and after an entire industry has begun to flourish harmlessly, should not call forth drastic, punitive measures, vastly disproportionate to the offense alleged.

Videotape recording is a new technology that threatens, not for the first time in history, to propel events and relationships far ahead of the development of the law. In drafting the 1976 Copyright Revision Act the Congress made some advance provision for the problem of statutory obsolescence. But even the "now known or later developed" formula (*e.g.*, §§ 101, 102) is insufficient to resolve all of the issues raised by the rapidly widening division between full protection of the rights secured in Section 106, 17 U.S.C. § 106, and the technologically expanded rights, desires, and capabilities of individual members of the public for access to information and works of art.

An established industry that answers the needs and desires of the public and of the Constitution, as exercised in the privacy of individual homes, without the least demonstrated harm to copyright owners, cannot be taxed without gross inequity; cannot be policed without drastic invasions of privacy; and cannot be prohibited without massive and unnecessary economic disruptions. To attempt to do any of these things is to use the law not in the interest of reason or equity, but merely for vengeance.

CONCLUSION

For the reasons stated above and in the Petition, the Writ of Certiorari prayed for should be granted.

Respectfully submitted,

STEVEN C. KANY
(Counsel of Record)
Attorney for Amicus Curiae
Pfizer Inc.

April 26, 1982

APPENDIX

Consents of Parties to Filing of Amicus Curiae Briefs

No. 81-1687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, et al.,

Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC., and
WALT DISNEY PRODUCTIONS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WRITTEN CONSENT OF ALL PARTIES TO FILING OF AMICI CURIAE BRIEFS
(Sup. Ct. R. 36.1)

All parties to this action, through their respective undersigned counsel of record, hereby give written consent to

the filing, prior to consideration of the petition for writ of certiorari, of each and every brief of an amicus curiae.

Dated: March 19, 1982.

/s/ DEAN C. DUNLAVEY
Dean C. Dunlavey, Esq.
Counsel of Record for all Petitioners —Sony Corporation of America, Sony Corporation, Carter Hawley Hale Stores, Inc., Associated Dry Goods Corporation Federated Department Stores, Inc., Henry's Camera Corporation, and Doyle Dane Bernbach, Inc.

Dated: March 22, 1982.

/s/ STEPHEN A. KROFT
Stephen A. Kroft, Esq.
Counsel of Record for all Respondents —Universal City Studios, Inc. and Walt Disney Productions

Amicus Brief

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No. 81-1687
IN THE

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October Term, 1981

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Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF AMICUS CURIAE SANYO ELECTRIC, INC.

ANTHONY LIEBIG,
LILLICK MCHOSE & CHARLES,
707 Wilshire Boulevard,
Los Angeles, Calif. 90017,
(213) 620-9000,
Attorneys for Sanyo Electric, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF OF AMICUS CURIAE SANYO ELECTRIC, INC.

I.
Interest of Amicus.

Sanyo Electric, Inc. is a Delaware corporation engaged, in distributing video tape recorders (VTRs) in the United States. It is interested in this matter because the outcome will affect its business and because it is one of the 50 defendants in respondent Universal City Studio's second copyright infringement action in the United States District Court for the Central District of California. Similar cases may be filed at any moment against these 50 defendants and others by literally hundreds of potential plaintiffs. What happens in this case will affect all those cases, a major industry, and, most important, the American public.

II.

Argument: The Decision Below Was Clearly Wrong and Should Be Reversed as Soon as Possible.

> *"The Copyright Law, like the patent statutes, makes reward to the owner a secondary consideration."*[1]
>
> *"We cannot recognize copyright as a game of chess in which the public can be checkmated."*[2]

In its parochial approach to a momentous issue the Court of Appeals established a wrong precedent by failing to consider an important national policy and the First Amendment rights of the millions of VTR owners.

The Court of Appeals concluded there was infringement after balancing only the rights of the parties. *What was required was an informed three-way balancing of respondents' rights under the Copyright Law, national policy, and the citizenry's rights under the First Amendment.*

Such a balancing compels a holding that delayed viewing, or time-shifting, does not constitute copyright infringement, which in turn compels a holding that VTR's are staple items of commerce and that making them available to the public does not constitute copyright infringement.

The over-arching national policy is that of preserving the public commons, public domain, or *publici juris*. That there is a public domain has been so universally accepted and understood that it is hardly mapped and often taken for granted. The public domain is not merely a vacuum or lawless jungle; it is an asset of the citizenry more precious than the navigable streams, scenic wonders, redwoods, etc. Under the Constitution (Art. I, §8, Cl. 8) copyright and patent are *drastically limited exceptions to the public domain, and there are no others*. To even obtain these limited

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[1]*United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158, 92 L.Ed. 1260, 1292-93, 68 S.Ct. 915 (1948).

[2]*Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967).

monopolies for that which is original and novel the creator must *dedicate* his entire creation to the public domain.[3] In this context, "fair use", which has been discussed so much in this proceeding, is perhaps best understood as the consequence of a partial dedication of "expression" at the time of "publication".[4]

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[3] *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 45 L.Ed.2d 84, 95 S.Ct. 2040 (1975); *Lear, Inc. v. Adkins*, 395 U.S. 653, 23 L.Ed.2d 610, 89 S.Ct. 1902 (1969); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 11 L.Ed.2d 661, 84 S.Ct. 784 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 11 L.Ed.2d 669, 84 S.Ct. 779 (1964); *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 90 L.Ed. 47, 66 S.Ct. 101 (1945); *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 83 L.Ed. 73, 59 S.Ct. 109 (1938); *International News Service v. Associated Press*, 248 U.S. 215, 63 L.Ed. 211, 39 S.Ct. 68 (1918); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 41 Ed. 118, 16 S.Ct. 1002 (1896).

[4] "Does this doctrine ["fair use"] — a floating one, not mentioned in the statute — bring into our inquiry anything new or special? We are told that the earliest American report in which the expression appeared — within quotation marks — was that of *Lawrence v. Dana* [15 Fed. Cas. 26, 60 (No. 8136) (C.C.D. Mass. 1869). On early usages of fair use or cognate expressions, see Cohen, 'Fair Use in the Law of Copyright', in 6 ASCAP, COPYRIGHT LAW SYMPOSIUM 43, 48-49 (1955)] in 1869, where the defendant's edition of Wharton's 'Elements of International Law' was accused as a plagiarism of the plaintiff's earlier edition of the same work. Justice Clifford's opinion, sustaining the charge, followed Story on the factors to be considered in adjudging liability for the research uses of one scholarly book by another; [Justice Clifford relied particularly on *Folsom v. Marsh*, 9 Fed. Cas. 342, 348 (No. 4901) (C.C.D. Mass. 1841)], fair use emerged as the sort of taking which on such consideration would be held noninfringing. Justice Clifford was not being consciously innovative. Judge Hand in the *Nichols* and *Sheldon* cases seemed also to speak of fair use as merely the contrary of infringement. [*Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936)]. But other authorities have taken fair use to refer to a set of justifications averting liability for what on the face of things is infringement. [Nimmer, Copyright §145, at 654 (1965). *See generally* Cohen, *supra* note 89, at 45-48.] This tends to leave the impression that infringement itself is decided without contamination by notions of policy, with fair use coming in later to supply those notions. But policy runs throughout our subject, as much of the discourse to this point shows . . ." Kaplan, Benjamin, "An Unhurried View of COPYRIGHT," Columbia University Press, New York (1967) page 67.

The public domain also includes the *rights to do* various things such as to reproduce formerly copyrighted works, to utilize all ideas, facts, sounds and colors wherever found, to read a copyrighted story to a child, to sing a copyrighted song in the shower.

While the public domain in the electronic age is still largely *terra incognita*, Congress has recognized its importance and confirmed it in the Copyright Act and the Communications Act of 1934. Section 102(b) of the Copyright Revision Act of 1976 [17 U.S.C. 102(b)] provides:

> "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

The purpose of Federal regulation of the limited channels of radio communication has always been to preserve their public domain character, encourage a rapid, efficient national communications service and to encourage use in the public interest.[5] As this Court stated in *Red Lion* and *Columbia Broadcasting System v. Democratic National Committee:*

> "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC"[6]

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[5] 47 U.S.C. §§151, 303.

[6] *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390, 23 L.Ed.2d 371, 389, 89 S.Ct. 1794 (1969); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 102, 36 L.Ed.2d 772, 93 S.Ct. 2080 (1973).

In June 1981 the Court of Appeals for the Second Circuit gave force to this principle by affirming FTC action which enabled cable television subscribers to "receive a service more responsive to their viewing preferences."[7]

It is generally accepted that there is also a relationship between Copyright and the First Amendment. While that relationship has yet to be fully defined, it is clear that First Amendment values do *limit* copyright, particularly on the idea/expression frontier.[8]

This Court has also made it clear that First Amendment rights include the right to *receive* as well as express[9] and that First Amendment rights may be exercised by *conduct*.[10]

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[7]*Malrite T.V. v. F.C.C.*, 652 F.2d 1140, 1151 (2d Cir. 1981).

[8]*See, e.g.*, Nimmer, "Does Copyright Abridge the First Amendment Guaranties of Free Speech and Press?" 17 U.C.L.A.L. Rev. 1180 (1970); Goldstein, "Copyright and the First Amendment", 70 Colum. L. Rev. 983 (1970). *Cf. Rosemont Enterprises, Inc. v. Random House Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009, 17 L.Ed.2d 546, 87 S.Ct. 714 (1967); *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130 (S.D.N.Y. 1968); and *Meeropol v. Nizer*, 361 F.Supp. 1063 (S.D.N.Y. 1973).

[9]These rights of access include: The right to receive important information, *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1819 (1976); the right of "suitable access to social, political, aesthetic, moral and other ideas and experiences," *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390, 23 L.Ed.2d 371, 89 S.Ct. 1794 (1969); the right to "receive information and ideas," *Kleindienst v. Mandel*, 408 U.S. 753, 760, 762-65, 33 L.Ed.2d 683, 92 S.Ct. 2576 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243 (1969); the right to receive printed matter, *Lamont v. Postmaster General*, 381 U.S. 301, 14 L.Ed.2d 398, 85 S.Ct. 1493 (1965); the right of access to certain religious publications, *Cruz v. Beto*, 405 U.S. 319, 31 L.Ed.2d 263, 92 S.Ct. 1079 (1972); the right of access to the courts, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 30 L.Ed.2d 642, 92 S.Ct. 609 (1972); the right of addressees of letters to read the letters without censorship, *Procunier v. Marinez*, 416 U.S. 396, 40 L.Ed.2d 224, 94 S.Ct. 1800 (1974).

[10]*See Spence v. Washington*, 418 U.S. 405, 41 L.Ed.2d 842, 94 S.Ct. 2727 (1974).

Recent and continuing technological developments have made possible new assaults on public domain and First Amendment rights. Better understanding, definition, and defense of these public domain and First Amendment perception rights is now required before they are gobbled up by the greedy.

The Court of Appeals did not reach for the required "sensitive tools" in this unique case.[11] It apparently based its decision on what goes on *inside* a VTR rather than considering time-shifting, or delayed viewing, as an *activity*. It thought about "home recording" when the home-recorded "copy" consisted of some magnetized particles on a coated plastic tape inside a black box and labelled the person "infringer" who merely viewed when he chose instead of when the broadcaster broadcast. *It should have considered what was happening!*

The VTR is not just a shiny gadget or "convenience."[12] It is a significant advance in human communication. It improves that communication by serving as an extension of the recipient mind like a hearing aid or stereo system, microscope, contact lens or optic tennis ball.

By enabling delayed viewing the VTR enhances reception of communications which the government has permitted in the public interest. It promotes national and First Amendment values because it enables a person to perceive and understand what he might otherwise miss and to remember what he might otherwise forget.

When one compares the television reception/perception/retention experience with owning and reading a book or magazine, it becomes clear that the VTR liberates viewers from the three tyrannies inherent in the broadcasting medium: The tyranny of scheduled evanescence, which re-

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[11]*Speiser v. Randall*, 357 U.S. 513, 525, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958).

[12]Below at 659 F.2d 972.

quires a person to be in front of his television set at the appointed time or miss the transmission; the tyranny of prime-time and counter-programming, which result in the more popular programs being broadcast simultaneously during a particular part of the day; and the tyranny of imperfect memory.

Seen in this light it is obvious that delayed viewing should not be held to be a copyright infringing activity.

By the same token, respondents should be seen as no better vis-a-vis the VTR owner than a book publisher who demands tribute when the book owner re-reads or lends, or the sculptor who has sold his statue to the city and still tries to charge tourists when they photograph it in the public square.

Conclusion.

The "sensitive tools" are now required. The many questions suggested by this case will become more and more important as we move to the 21st century. Some of them must be answered in this case, and they should be answered now. Further proceedings below could not make the issue plainer and, in fact, could obscure it.

DATED: March 19, 1982.

Respectfully submitted,

ANTHONY LIEBIG,
LILLICK MCHOSE & CHARLES,
By ANTHONY LIEBIG,
Attorneys for Amicus Curiae
Sanyo Electric, Inc.

Amicus Brief

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No. 81-1687

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF SEARS, ROEBUCK AND CO. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MAX L. GILLAM
LATHAM & WATKINS
555 South Flower Street
Los Angeles, California 90071
(213) 485-1234

PETER L. WINIK
LATHAM, WATKINS & HILLS
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 828-4400

Counsel for Sears, Roebuck and Co. as Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF SEARS, ROEBUCK AND CO. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Pursuant to Rule 36 of the Rules of this Court, Sears, Roebuck and Co. ("Sears") files this Brief as *Amicus Curiae* urging that the petition herein for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit be granted. [1]

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[1] Pursuant to the requirements of Rule 36 of the Rules of this Court, the parties to this action have consented to the filing of briefs *amicus curiae*. Such consent was filed with this Court on March 30, 1982.

INTEREST OF AMICUS CURIAE

Sears is the seller of the Betavision videotape recorder ("VTR") and of cassettes designed for use with the VTRs. The opinion of the Court of Appeals, if permitted to stand, may be argued to have a conclusive effect on the rights and liabilities of all VTR sellers, including Sears, and may be used in an attempt to enjoin Sears' own sales of VTRs. Indeed, in the wake of the Court of Appeals' decision Universal City Studies, one of the respondents herein, filed a suit parallel to this case against Sears and other VTR manufacturers and distributors, in Los Angeles, seeking declaratory, injunctive and monetary relief.

Accordingly, Sears submits that it will be directly and immediately affected by the decision of the Court of Appeals and by the Court's disposition of the instant Petition.

ARGUMENT

I

THE IMPACT OF THE COURT OF APPEALS' ERROR IS SUBSTANTIAL AND FAR REACHING, AND THE ISSUES ARE RIPE FOR DECISION BY THIS COURT

This case presents exceptionally significant questions of national import and first impression arising under the federal copyright laws. Among the startling propositions embraced by the Court of Appeals below are:

(1) Copyright infringement results from private, non-commercial copying by individuals, thus granting a copyright owner vast powers to control the manner in which a member of the public may enjoy the licensed broadcast of copyrighted material in the privacy of his own home; and

(2) Contributory infringement results from the mere manufacture, sale or distribution of a product which can be used to infringe copyrights, thus allowing a copyright owner to prevent the manufacture or sale of new technology simply

because that technology may be used, among other uses, to infringe his copyright.

The Court of Appeals rejected the clear and contrary legislative history which accompanied the 1976 Copyright Act and held that the recording of a copyrighted television program by a viewer in his own home for his personal use constitutes copyright infringement, and does not fall within the broad and flexible "fair use" privilege in the copyright laws. The court's conscious failure to acknowledge the relevance — let alone the merits — to the "fair use" inquiry of countervailing constitutional considerations founded on the viewer's rights to privacy and access to newsworthy, educational and historical broadcasts establishes troubling precedent.

The Court of Appeals also held that it is contributory infringement *per se* to manufacture or sell a VTR that may be used to make an unauthorized recording of copyrighted material, even though — according to the undisturbed finding of the district court — VTRs may be used for a multitude of non-infringing uses. Such uses include: (a) playing authorized pre-recorded tapes; (b) authorized reproduction of copyrighted programs; (c) recording and playing uncopyrighted broadcast television programs; and (d) playing home movies made with a video camera.

Although the basis of the Court of Appeals' holding that the manufacture and sale of VTRs constitutes contributory infringement is unclear, under one plausible interpretation,[2] the far-reaching and dramatic effect of this decision would be that the manufacturers and sellers of such products as tape recorders, photocopying machines, typewriters, and cameras — which like VTRs may be used for infringing as well as non-infringing purposes — would be *per se* liable to copyright holders as contributory infringers if their products could ever be

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[2] *See* p. 8, *infra*.

used for infringing purposes and regardless of the manufacturers' and sellers' lack of inducing activity.[3]

The issues raised herein are ripe for review by this Court at this time, as the decision of the Court of Appeals without doubt will otherwise have a profound impact on the future course of the VTR industry. Moreover, beyond the immediate and comparatively narrow context of the VTR industry the Court of Appeals' holdings threaten every manufacturer and seller of any product of any type, which might be used in some infringing manner, with litigation under an unprecedented theory of contributory infringement, and they establish dubious constitutional precedent in the areas of privacy and media access.

II

THE COURT OF APPEALS ERRONEOUSLY DISREGARDED THE FACT THAT THE RIGHTS OF PRIVACY AND MEDIA ACCESS ARE OF CONSTITUTIONAL DIMENSION AND HELD PRIVATE NON-COMMERCIAL VIDEO RECORDING OF COPYRIGHTED TELEVISION BROADCASTS TO BE INFRINGEMENT

The doctrine of "fair use" is a flexible,[4] limited privilege to use copyrighted material without consent. *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 306-307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). One factor to be considered in determining whether use of copyrighted mate-

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[3] The Court of Appeals left undisturbed the district court's finding that "there was no evidence at trial that any advertisements or other statements by defendants in any way induced or caused to be made any of the copies at issue." *Universal Studios, Inc.* v. *Sony Corp. of America*, 480 F. Supp. 429, 459. (C.D. Cal. 1979).

[4] *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5680. ("[T]here is no disposition to freeze the ['fair use'] doctrine in the statute, especially during a period of rapid technological change. . . . [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis.")

rial is "fair use" is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107. Considering the purpose and character of the home use of VTRs in this case, the district court found that the "purpose of this use is to increase access to the material plaintiffs choose to broadcast [which is] consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves," and that because "the use occurs within private homes, enforcement of a prohibition would be highly intrusive and practically impossible." *Universal City Studios, Inc.* v. *Sony Corp. of America*, 480 F. Supp. 429, 454 (C.D. Cal. 1979), *aff'd in part and rev'd in part*, 659 F.2d 963 (9th Cir. 1981). Accordingly, the district court held that private, non-commercial video recording of copyrighted television programs falls within the "fair use" privilege and thus does not constitute copyright infringement. Nonetheless, the Court of Appeals rejected outright the contention that constitutional concerns were relevant to the "fair use" inquiry, and it held that VTR use is not "fair use." 659 F.2d at 972.

This Court has not addressed the question of whether considerations of constitutional import bear upon the "fair use" issue, but it has acknowledged the tension between the copyright laws and other legal interests of constitutional magnitude. *See Mazer* v. *Stein*, 347 U.S. 201, 217 (1954) (ideas not subject to protection, only method of expression). *Accord, Sid & Marty Krofft Television* v. *McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) (idea/expression dichotomy "serves to accommodate the competing interests of copyright and the first amendment").[5] Especially where receipt of information and

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[5] Analogously, the common law privilege of "fair comment" in defamation actions was traditionally employed to strike a balance between reputational interests and the values of free discussion about public affairs. *See* W. Prosser, *Law of Torts* § 118, at 819 (4th ed. 1971).

ideas is concerned, courts have shielded citizens in their homes from the reach of otherwise applicable laws and regulations. *See, e.g., Stanley* v. *Georgia*, 394 U.S. 557 (1969) (obscene literature laws do not reach into the home); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (invalidating birth control law that can be enforced only by "invading" private bedrooms). Here, as in *Stanley*, there is a powerful interest in being "free from state inquiry into the contents of [one's] library." 394 U.S. at 565. Moreover, the VTR ensures that the public has profoundly enhanced access to the wealth of uncopyrighted information which is televised daily. For example, VTRs may be used to record the State of the Union Address, Presidential press conferences, important congressional hearings — such as Watergate — and even televised trials. The First Amendment guarantees such public access. *See Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 575-78 (1980); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973).

The Court of Appeals ignored the constitutional considerations implicit in its decision and failed to realize that the flexible privilege of "fair use" presents an appropriate vehicle for accommodating copyright and privacy/access interests during a time of rapidly changing technology.

III

THE COURT OF APPEALS ERRED BY IGNORING THE SUBSTANTIAL NUMBER OF LEGITIMATE USES FOR VTRs WHEN IT HELD A MANUFACTURER AND DISTRIBUTORS OF VTRs TO BE CONTRIBUTORY COPYRIGHT INFRINGERS

The issue of whether VTR manufacturers and distributors may be held liable as contributory infringers raises novel questions of law which remain unresolved. The Court of Appeals held a manufacturer and sellers of VTRs to be contributory copyright infringers because VTR equipment may be used for

home video recording of, among other things, copyrighted works. Even assuming that private video recording in the home was copyright infringement, the Court of Appeals' contributory infringement ruling is still staggeringly overboard.

We are unaware of any prior case holding that the mere manufacture or sale of machinery with the capability of being used in illegal copying would support a claim of contributory copyright infringement. The basis for determining when such contributory infringement occurs must turn — as it does in the patent infringement context — on whether a machine is a "non-staple" item, *i.e.*, a device without substantial non-infringing uses.[6] Properly applying the "staple/non-staple" distinction, the district court found that VTRs are "capable of a variety of uses, some of them allegedly infringing." 480 F. Supp. at 461. The district court accordingly held that the VTR is a "staple" product and that manufacturers and distributors of the VTR could not be contributory infringers without evidence of inducing, causing or materially contributing to the infringing conduct of another. *Id.*

The Court of Appeals stated that "reliance on the 'staple article of commerce' theory was inappropriate," but nonetheless ambiguously considered the question of whether VTR's have real non-infringing uses. Without reversing the district court's factual finding that the VTR is suitable for substantial non-infringing uses, the Court of Appeals stated that:

> "[v]ideotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Virtually all television programming is copyrighted material. Therefore, videotape recorders are not 'suitable for substantial non-infringing use.' "

659 F.2d at 975 (footnote omitted). The only support for this crucial factual assertion was a citation to the treatise *Nimmer on Copyright*.

---

[6] *See Aro Manufacturing Co., Inc.* v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964).

A confused state of the law has been left in the wake of the Court of Appeals' treatment of the contributory infringement issue. One interpretation of the court's opinion is that the court held that the staple/non-staple distinction has no relevance in the contributory copyright infringement context (and that it felt compelled to opine in *dicta* that the VTR is non-staple). If the Court of Appeals' opinion is construed by courts in the future to stand for this drastic and inflexible proposition, then it inevitably follows that manufacturers of items ranging from cassette recorders to photocopiers to typewriters will face liability as contributory copyright infringers if their products are ever used for infringing activities. Specifically, a court might find indistinguishable a future case brought against a manufacturer of cameras which may be used to photograph images off of television screens. In reliance on the Court of Appeals' opinion, the camera manufacturer might be held liable for contributory copyright infringement.

In sum, the issue of when such contributory infringement occurs realistically must be based upon whether the product is "non-staple," *i.e.*, without substantial, non-infringing uses. If the Court of Appeals' opinion is interpreted as an affirmation of the applicability of the staple/non-staple distinction in the contributory copyright infringement context, then the Court of Appeals plainly erred because there was (despite the Court of Appeals' failure to address the district court's finding) an adequate basis for the district court's factual determination that VTRs have substantial non-infringing uses.

IV

CONCLUSION

For the reasons above stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MAX L. GILLAM
LATHAM & WATKINS
555 South Flower Street
Los Angeles, California 90071
(213) 485-1234

PETER L. WINIK
LATHAM, WATKINS & HILLS
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 828-4400

Counsel for Sears, Roebuck and Co. as Amicus Curiae

Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, et al.,

Petitioners,

—vs.—

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF ON BEHALF OF TDK ELECTRONICS CO., LTD.

KO-YUNG TUNG
(Counsel of Record)
ADAM YARMOLINSKY

TUNG, DRABKIN & BOYNTON
One Citicorp Center
New York, New York 10022
212-751-0566

Attorneys for the Amicus Curiae

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF ON BEHALF OF TDK ELECTRONICS CO., LTD.

The brief *amicus curiae* is submitted by TDK Electronics Co., Ltd. ("TDK"), a Japanese corporation.[1] Consents have been obtained from all the parties, copies of which have been filed with the Clerk of this Court.

1 TDK operates in the United States through its wholly-owned subsidiary, TDK U.S.A. Corporation (a New York corporation), which in turn owns TDK Electronics Corporation (a New York corporation), TDK Corporation of America (a California corporation), TDK Magnetics Corporation (a California corporation) and Saki Magnetics, Inc. (a California corporation).

Petitioners Sony Corporation et al. seek the issuance of a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.[2] TDK supports their Petition.[3]

The importance of the case requires the review of this Court.[4] Leaving intact the decision below would brand millions of ordinary American individuals as criminals and threaten the privacy of their homes. The survival of the billion dollar VTR, as well as audio and video tape, industry hangs on this case. Lastly but not the least, this case affords this Court an opportunity to clarify the doctrine of fair use, long characterized as "the most troublesome in the whole law of copyright."[5] Such clarification will obviate much unnecessary litigation.

INTEREST OF AMICUS CURIAE

Whether or not home use recording constitutes copyright infringement directly affects this *amicus curiae*. TDK is the world's largest manufacturer of audio and video tapes and produces ferrite and other electronic components used in VTRs. In 1981, U.S. sales of TDK video and audio tapes amounted to approximately $160 million.

TDK, through its U.S. subsidiaries, directly employs more than 750 persons in the United States. Currently over 80% of

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2 The Court of Appeals' judgment and opinion below are reported at 659 F.2d 963 (9th Cir. 1981), and appended to Petitioners' Petition as Appendix A (cited herein as "Pet. App. 1 et seq."). The judgment and opinion of the District Court below are reported at 480 F. Supp. 429 (C.D. Cal. 1979) and appended to Petitioners' Petition as Appendix B (cited herein as "Pet. App. 31 et seq.").

3 Petitioners' Petition will be cited herein as "Petition."

4 *See* Petition 9-11.

5 *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939), (*per curiam*, presided over by L. Hand, J.) *quoted in* Pet. App. 13.

the TDK video and audio tapes sold in the United States are manufactured in the United States. Audio tapes are produced at TDK's plant in California and video tapes in Georgia. TDK has invested well over $50 million to build and equip those two plants. As the plants' production capacity expands, those domestic production percentages are projected to increase.

TDK is submitting a separate brief because the arguments made in this brief have neither been presented by the parties nor examined by the lower courts.

SUMMARY OF ARGUMENT

Home use recording is fair use for the following reasons.

(1) Both the Court of Appeals and the District Court below erred in their respective modes of analysis of the Copyright Revision Act of 1976 (the "1976 Act"). Specifically, each court analyzed as separate and distinct the two questions of (a) whether courts may look to legislative history to interpret Section 106 of the 1976 Act and (b) whether home use recording satisfied the four factors mentioned in Section 107 of the 1976 Act.

The correct mode of analyzing the 1976 Act is to examine whether it is proper to resort to legislative history in order to define the "fair use" exception contained in Section 107 of the 1976 Act. We conclude it is. The "clear language" of Section 106 may erect a wall blocking a view to its legislative history, but Section 107 opens a window in that wall.

(2) Legislative history of Section 107 clearly evinces that home use recording is to be deemed fair use. The legitimate rights of copyright holders were outweighed by the dual concerns of privacy of the general citizenry and impossibility of enforcement. The equities having already been balanced in the legislative process, judicial application of the four factors enumerated in Section 107 to home use recording is obviated.

(3) Both the Court of Appeals and the District Court below erred in their application of the four factors enumerated in Section 107. Both lower courts are under the impression that the four factors are cumulative tests for fair use determination. Not only are the four factors merely illustrative, but they were misapplied with respect to home use recording. Proper application results in a finding that home use recording is fair use.

ARGUMENT

HOME USE RECORDING IS FAIR USE.

1. In Determining Fair Use under Section 107, Courts Must be Guided by Legislative History.

Section 106 of the 1976 Act grants the "bundle of rights" exclusively to the owner of the copyright. Noting that "The statutory framework [of the 1976 Act] is unambiguous; the grant of exclusive rights is only limited by statutory exceptions" (Pet. App. 6), the Court of Appeals refused to look to legislative history of Section 106. However, the "fair use" exception embodied in Section 107 is sufficiently (and intentionally) ambiguous and flexible to benefit from the illumination of legislative history.[6]

The judicial doctrine of fair use (statutorily recognized) is an omnibus "safety valve" against certain unintended (i.e., unfair) consequences of an absolute copyright monopoly. Lurking in the corners of the doctrine of fair use is a legislative (and judicial) recognition that a literal enforcement of statutory provisions for copyright protection in certain circumstances may collide with superior interests worthy of protection.[7]

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6 *See generally* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892 (1982).

7 The District Court below recognized that when Congress passed the 1976 Act, it was sensitive to the problems of trespassing on the individual's right of privacy:

(footnote continued on next page)

The codification of the common law of fair use was not intended to freeze its definition or application. The House Report[8] accompanying the bill for the 1976 Act declared:

> "The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. . . .
>
> "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." (Quoted and cited in Pet. App. 67.)

The Court of Appeals itself noted that:

> "The history states that the legislation endorses the purposes and general scope of the *judicial doctrine* of fair use, but there is no disposition to freeze the doctrine in the statute." (Pet. App. 14; emphasis in the original.)

Recognizing the fair use exception as a judicially developed "equitable rule of reason" (quoted and cited in Pet. App. 86), Congress consciously refrained from statutorily defining the exact contours of the doctrine and left it up to the courts to apply it flexibly on a case-by-case basis:

> "Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts

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> Congress can constitutionally legislate against some activity which may occur in the home, but doing so necessarily requires caution. . . . [I]n balance, Congress did not find that protection of copyright holders' rights over reproduction of their works was worth the privacy and enforcement problems which restraint of home use recording would create. [Pet. App. 65.]

See also Stanley v. Georgia, 394 U.S. 557 (1969); *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970).

8 H.R. Rep. No. 1476, 94th Cong. 2d Sess. 66 (1976), *reprinted in* [1976] U.S. Cong. & Admin. News 5659 (cited herein as the "1976 House Report"). The corresponding Senate Report is S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975).

> must be free to adapt the doctrine to particular situations on a case-by-case basis." (Quoted and cited in Pet. App. 67.)

The Court of Appeals recognized the impossibility of exact formulation:

> "[I]t is there [in the legislative history of Section 107] emphasized that the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules." (Pet. App. 14.)

Accordingly, the fair use doctrine must be applied flexibly, not rigidly, in light of Congressional intentions which are chronicled in legislative history.

2. Legislative History Shows that Home Use Recording is Fair Use.

Examination of the legislative history of Section 107 reveals home use recording is to be fair use since (a) no legitimate interests of the copyright holder would be unfairly compromised and (b) enforcement of copyright infringement would raise the specter of invasion of the constitutional right of privacy, as well as of practical impossibility. So long as the off-the-air recording (whether audio or video) is for non-commercial, private home use, it is to be exempted as fair use. No further inquiry is necessary.

Mere days before Congress passed the 1971 Amendment,[9] Representative Kastenmeier of Wisconsin, Chairman of the Subcommittee reponsible for the amendment,[10] engaged in the

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9 The Sound Recording Act of 1971. For discussion on the relevance of the legislative history of the 1971 Amendment to the 1976 Act, see Petition 14-16 and Pet. App. 56-68.

10 In addition to his role of Chairman of the House Subcommittee responsible for the 1971 Amendment, Representative Kastenmeier was also the sponsor of the general copyright revision legislation and a member of the Conference Committee that finally brought about the 1976 Act.

following exchange with Representative Kazen of Texas regarding non-commercial home recording:

> "MR. KAZEN. Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?
>
> "MR. KASTENMEIER. Yes.
>
> "MR. KAZEN. In other words, if your child were to record a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?
>
> "MR. KASTENMEIER. This is not included in the bill. I'm glad the gentleman raises the point.
>
> "On page 7 of the report, under 'Home Recordings', Members will note that under the bill the same practice which prevails today is called for; namely, *this is considered both presently and under the proposed law to be fair use.* The child does not do this for commercial purposes. This is made clear in the report." (Quoted and cited in Pet. App. 64; emphasis added.)

The portion of the House Report referred to by Mr. Kastenmeier stated:

> "Home Recording
>
> "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. *Specifically, it is not the intention of the Committee to restrain the home recording,* from broadcasts or from tapes or records, of recorded performances, where the home recording is *for private use* and with no purpose of reproducing or otherwise capitalizing commercially on it." (Quoted and cited in Pet. App. 60-61; emphasis added.)

In June 1971, Ms. Barbara Ringer (Assistant Register of Copyrights who later that year became Register of Copyrights) discussed off-the-air recording with Representative Edward Beister of Pennsylvania before Subcommittee No. 3 of the House Committee on the Judiciary:

> "MR. BEISTER. . . .
>
> "I can tell you I must have a small pirate in my own home.
>
> "My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set.
>
> ". . . [T]his legislation, of course, would not point to his activities, would it?
>
> "MISS RINGER. I think the answer is clearly, 'No, it would not.'
>
> "I have spoken at a couple of seminars on video cassettes lately, and this question is usually asked: 'What about the home recorders?'
>
> "The answer I have given and will give again is that this is something you cannot control. You simply cannot control it." (Quoted and cited in Pet. App. 62-63.)

Further, in contrasting public distribution of bootleg films for private home use recording, Ms. Ringer observed:

> "But I do not see anybody going into anyone's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping.
>
> "MR. BEISTER. Secondly with respect to video cassettes, are we approaching an additional problem, not with respect to private use, but with respect to public distribution after it has been retrieved over a home set?
>
> "MISS RINGER. The answer is very definitely, 'yes'.

> "For years, the motion picture industry has been faced with bootlegging problems, much of it deriving from the 1[6] mm. prints that were distributed to the Armed Forces and got out of control. The film industry has had a very active policing activity for years.
>
> "I think that this problem is going to undergo a quantum increase when video cassette recorders are freely available. But I would say that there is a big difference, and I think it is something that you might consider. In that area, they have got copyright protection, and in this area, who knows? It is certainly not protectable under the Federal statute." (Quoted and cited in Pet. App. 63.)

The foregoing manifests the undisputed view in the Congress that home use recording is to be considered fair use. Accordingly, it is not necessary for the courts to analyze home use recording against the four factors listed in Section 107.

3. Considered under the Four Factors, Home Use Recording is Fair Use.

While Congress refused to define statutorily the fair use doctrine, it did nonetheless offer four factors to consider in determining fair use. Both lower courts are under the misguided impression that the four factors are cumulative tests of fair use determination.[11] This is not so.

The four factors were offered merely to be illustrative rather than determinative or cumulative.

> "Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable

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11 Though the District Court states that the four "factors are neither exclusive nor required[, t]he factors are illustrative, not definitive" (Pet. App. 70), it nonetheless appears to be somehow compelled to clear each of the tests.

> definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though *in no case definitive or determinative,* provide some gauge for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107." (1976 House Report 65; emphasis added.)

Distracted by the enumerated four factors, both the Court of Appeals and the District Court have failed to see the forest for the trees. The essence of fair use is *fairness*—"the doctrine is an equitable rule of reason" (*id.*) and the four factors merely "provide some gauge for balancing the equities" (*id.*).

Even if the four factors listed in Section 107 were to be applied as "determinative tests", home use recording would be found to be fair use. Of the four factors the first and last factors are particularly relevant here.

The purpose and character of the use is video recording of free off-the-air TV programs for private viewing at a later time. Thus the use at issue here is exactly that intended by the copyright holder, namely, to permit television viewers to watch the TV program without charge.[12] Time shift copying changes nothing. It is no more significant than the act of putting aside a book for later reading. This use is clearly not commercial; it is not even "for non-profit educational purposes" in that such purposes imply performances for the benefit of others. Here the viewer is recording the program for his own benefit or for that of his immediate family.

Nor can the viewer avoid exposure to the interspersed advertising material (from which the copyright holder indirectly derives revenue) any more easily by home use copying

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12 Query what Respondents' position would be with respect to the person who charges admission to see free off-the-air television programs at the time of telecast (without taping). For example, a bar may charge extra admission to customers to sit and watch the World Series.

than he can by turning off the commercials during direct viewing of a program.

The Court of Appeals appears to find it fatal to fair use that the purpose and character of the use is "copying of entertainment works for convenience" (Pet. App. 19). Whether the work itself or the purpose of copying is educationally meritorious or mere entertainment is irrelevant. The Copyright Act does not pass judgment—if it did, Walt Disney's Donald Duck might not be copyrightable. The Constitution empowered Congress to enact copyright laws "to promote the progress of science and useful arts." If the work is worthy of copyright, its copying cannot be denigrated because of its contents for fair use purposes.[13]

Clearly if the use is commercial, it would not constitute fair use, but this case is limited to non-commercial uses. The 1976 House Report explains:

> "The Committee has amended the first of the criteria to be considered—'the purpose and character of the use'—to state explicitly that this factor includes a consideration of 'whether such use is of a commercial nature or is for non-profit educational purposes.' This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions." (1976 House Report 66.)

The non-commercial purpose, while not conclusive under this test, is persuasive (if not presumptive)[14] in finding fair use.

For home use recording, the second and third factors are neutral—the nature of the copyrighted works of U/D is

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13 For a more legalistic approach to this issue, see Petition 22-23.

14 *See* Part 2 of this Argument, *supra* at 6-9.

audiovisual television programs substantially all of which (including commercials) are recorded.

In this case, the fourth factor[15] would be positive, rather than negative, in finding fair use. Home use recording does not adversely affect the potential market for or the value of U/D's copyrighted works. In fact, it only enhances their potential market and value.

There are basically three separate markets for U/D's copyrighted works. The first market consists of television stations; the second, home users of pre-recorded video cassettes; and the third, movie theatres for public showing. Since the potentiality and the value of the copyright work in the television station market are determined essentially by ratings, which in turn depend on the number of viewers (including the number of home use recordings), home use recording will have a positive effect for the copyright holder.

It is conceivable that the potentiality and the value of the copyrighted work might be reduced in the other two markets by time-shifting.[16] For example, a person who missed seeing a TV program at the time of its telecast might buy it as a video cassette or go to the movie theatre to see it. However, the very fact of U/D's sale of its copyrighted works to TV stations for free off-the-air broadcast adversely affects the other two markets. Obviously, U/D has considered this negative effect but has determined that the positive effect on the TV station market offsets the potential losses on the other two markets. Time shifting would merely magnify the imbalance of the effects on the markets without tipping the scales.

Since home use recording further increases the positive effect on the first market, U/D cannot claim to have been injured by home use recording. In fact U/D concedes that it has not suffered any monetary damages, and both the Court of Ap-

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15 *See* 3 Nimmer on Copyright § 13.05[A][4](1981) for the application of the fourth factor.

16 Multiple recording or librarying practices are not considered here.

peals and District Court so found. The Court of Appeals erred in assuming potential harm.[17]

In analyzing the effect of reproduction, it is essential to distinguish "hard copy" such as a book from "soft copy" such as a TV program. The copyright holder of a hard copy publication can control the number of copies in existence. But the copyright holder of a soft copy publication relinquishes his right to control the number of copies. The substantial copying of a "hard copy" almost invariably has a negative effect on the potentiality and value of the copyrighted work. The copying of an entire book, even for private use, may reduce by one the number of books sold. The same would be true for video cassettes. However, that is not the case when the copyright work is published in a "soft" ephemeral fashion.[18] A soft copy is published through electrical waves in the air. Once released to the air, it is gone. The number of soft copies is potentially infinite, determined by the sole discretion of the viewers. By time shifting, the number of receivers of the electric waves are increased, not reduced. It is fair to permit copying where there is no actual or even potential harm to the copyright holder.

The Court below erred in failing to examine the overall fairness of use involved here. Application of the doctrine of fair use cannot avoid the question of what is fair under all the facts and circumstances.

Both the Senate and House Committee Report on the 1976 Act point out that "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change" (Pet. App. 67). The VTR is a typical half way technology. The time cannot be far off when the home viewer will be able to time-shift his favorite programs by

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17 Pet. App. 25.

18 To this extent, the fair use analyses by the Court of Appeals and the District Court of *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975), are misdirected.

storing them temporarily in his home computer or by calling them up via cable or satellite from a central computer—with or without commercials. This interim technology is a bit clumsy, but it appears to harm no one. In due course, it may be necessary for the Congress to address the question of applying the copyright law to some of these new situations. In the meantime, this case seems an appropriate one for the application of the fair use doctrine in the exercise of judicial prudence.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should be issued.

Respectfully submitted,

KO-YUNG TUNG
(Counsel of Record)
ADAM YARMOLINSKY

Attorneys for the Amicus Curiae

April 23, 1982

Amicus Brief

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-1687

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD J. ZOELLER
(Counsel of Record)
MUDGE ROSE GUTHRIE & ALEXANDER
20 Broad Street
New York, New York 10005
(212) 701-1000
Attorneys for Amici Curiae Toshiba Corporation and Toshiba America, Inc.

Of Counsel:
JOEL DAVIDOW
HERVE GOURAIGE
MITCHELL B. NISONOFF
Mudge Rose Guthrie & Alexander

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI TOSHIBA CORPORATION AND TOSHIBA AMERICA, INC.

PRELIMINARY STATEMENT

On behalf of Toshiba Corporation ("Toshiba") and Toshiba America, Inc. ("TAI"), this *amici curiae* brief is filed in support of Sony Corporation of America's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review that court's judgment and opinion in *Universal City Studios, Inc. and Walt Disney Productions v. Sony Corp. of America, et al.*, 659 F.2d 963 (9th Cir. 1981) ("*Sony* action"). The written consent of all parties required by this Court's rule 36 is on file with the Clerk of this Court.

INTEREST OF AMICI CURIAE

Toshiba is a Japanese corporation that manufactures videotape recorders (VTRs) and videotape cassettes for use in VTRs. TAI, a wholly owned American subsidiary of Toshiba, distributes Toshiba VTRs and videotape cassettes throughout the United States. Subsequent to the decision of the Court of Appeals in the *Sony* action, one of the respondents herein, Universal City Studios, Inc. ("Universal"), sued fifty (50) manufacturers, distributors, and advertisers engaged in the VTR industry, including Toshiba and TAI. *Universal City Studios, Inc. v. RCA, et al.*, No. 81,5723 (C.D. Cal., filed Nov. 6, 1981) ("*RCA* action"). Respondents' claims in the present action and those Universal is making in the RCA action raise novel copyright issues and, prior to the instant case, have not been considered by any court. These issues should now be settled by this Court.

Although not identical, the claims in the *Sony* and *RCA* actions are closely related in that both cases include copyright infringement and unfair competition claims based upon the manufacture, sale, and use of VTRs. Notwithstanding differences in the two cases (*e.g.*, the differences in the marketing of VTRs between Sony on the one hand and defendants in the *RCA* action on the other, and the changes in consumer use of VTRs since trial of the *Sony* action), the decision in the present case will have major impact in shaping the pretrial and trial proceedings of the *RCA* action and in clarifying the law affecting this emerging industry. Accordingly, Toshiba and TAI will be directly affected by the Court's disposition of the present action.

HISTORY AND POSTURE OF THE CASE

This statutory copyright action, which was commenced in the United States District Court for the Central District of California in 1976, resulted in an nonjury judgment for petitioners at the trial level. In an opinion dated October 19, 1981, the United States Court of Appeals for the Ninth Circuit reversed that judgment. On January 12, 1982, the Court of Appeals denied a petition to reconsider its decision.

After a five week trial, the district court held, in a thorough and well-reasoned opinion, that none of the 32 instances of home VTR recording in issue was a direct infringement[1] and further held that there could have been no contributory infringement.[2] The Court of Appeals reversed, holding that *all* videorecording, including videorecording for purposes of subsequent private non-commercial viewing at home, "constitutes copyright infringement."[3] The opinion of the Court of Appeals further holds that the manufacturers, distributors, retailers and national advertisers of VTRs are liable as contributory infringers for merely making VTRs available to the public for home use.[4]

The Court of Appeals directed the district court to consider granting the relief sought by respondents, *i.e.*, an injunction against VTR sales and statutory damages (17 U.S.C. §§ 502, 504 (a)(2),(c)), and, relying on the unsupported suggestion of the Nimmer treatise[5] discussing remedies for copyright infringement by photocopying, suggested that "a continuing royalty . . . may very well be an acceptable resolution in this context."[6] Application of these copyright sanctions would

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1. 480 F. Supp. at 453-54, 469.

2. 480 F. Supp. at 459-61, 469.

3. 659 F.2d at 969, 976-77.

4. 659 F.2d at 974, 976-77; 480 F. Supp. at 461.

5. M.B. Nimmer, *Nimmer on Copyright* (1981).

6. 659 F.2d at 976. The Court of Appeals' full discussion of this issue is as follows:

> . . . Nimmer suggests that when great public injury would result from an injunction, a court could award damages or a continuing royalty.[18] This may very well be an acceptable resolution in this context.
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> ---
>
> 18. 'Ordinarily it would be improper, and even an abuse of discretion for a court to deny a permanent injunction where liability and a threat of continuing infringement have both been established. But if one looks to other areas of property law it is clear that a property owner may be denied a permanent injunction against further violations of his property right where such an injunction would work a substantial

drastically modify and possibly threaten the existence of the VTR industry.

ARGUMENT

1. THE DECISION BELOW RAISES SIGNIFICANT ISSUES OF CONSTITUTIONAL AND COPYRIGHT LAW

Amici Toshiba and TAI are in full agreement with petitioners' analysis of the opinion of the Court of Appeals in its Petition for Certiorari, and agree that a writ of certiorari should issue to review and ultimately rescind the judgment and opinion of the court below. Our independent examination of the opinion reveals even more errors of logic and analysis:

Firstly, the court's treatment of the "fair use" issue is cursory and unsatisfactory. Congress instructs that a fair use determination should include, among other things, consideration of the purpose and character of the use and of the nature of the copyrighted work.[7]

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injury to the public interest as well as to that of the particular defendant. *In such circumstances the property owner may be awarded, in lieu of an injunction, a reasonable royalty for the further use of his property. The courts might well conclude that photocopying practices for private use, particularly in the area of scientific writings, involve just such a public interest, so that a judicially created compulsory license as a substitute for injunctive relief could be found appropriate.*' Nimmer, *supra*, § 13.–05[E][4][e] at 13–91.

Id. (Emphasis added by the Court of Appeals.)

7. 17 U.S.C. § 107. The statute provides in pertinent part:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

With respect to the purpose and character of the use, the Court of Appeals, without consideration of legislative intent, states: "The statute [§ 107] does not . . . draw a simple commercial/non-commercial distinction."[8] This statement does not fully reflect the pertinent legislative history. Pertinent reference to non-commercial nature or non-profit educational purpose of the use was included in the House bill which amended section 107 to amplify the criteria to be used in judging fair use. The House Report notes:

> The Committee has amended the first of the criteria to be considered—'the purpose and character of the use'—to state explicitly that this factor includes a consideration of 'whether such use is of a commercial nature or is for non-profit educational purposes.' This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. *It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.*

Notes of Committee on the Judiciary, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5679 (emphasis added). The clear purport of the House amendment *was* to draw a commercial/non-profit distinction, but as "most of the discussion of section 107 [had] centered around questions of classroom reproduction, particularly photocopying," *id.*, it is clear that the amendment had an emphasis on non-profit educational purposes as an example of a non-commercial use. As practically all home videorecording is both private and non-profit, such non-commercial nature of the use should cut in

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(4) the effect of the use upon the potential market for or value of the copyrighted work.

8. 659 F.2d at 972.

favor of a finding of fair use, particularly in the context of home use.[9] Although "noncommercial use does not mean fair use," 480 F. Supp. at 453, all cases where non-profit use had been found not to be fair use involved the public dissemination of copies of the copyrighted work.[10] Other than the opinion below, there is no decision that has held that a non-profit, non-public, personal use of a copyrighted work is not "fair use" within the meaning of 17 U.S.C. § 107.

With respect to the nature of the work, there are two special features of a copyrightable work broadcast on television that differentiate it from other copyrightable items such as printed texts: (1) the television programs are sent to the homes of viewers free of charge to them; and (2) the programs in most circumstances are available for viewing at a particular time only; unless the program happens to be repeated or the viewer devises or obtains a method of preserving the program over time or of shifting the time during which it can be viewed, portions of programs missed by a viewer at the time of initial broadcast are forever "lost." In light of these particular characteristics of television programs, the Court of Appeals should have found that it was an entirely fair use for a viewer to employ a device that allows him to view at a later time in his own home a program that was sent into his home voluntarily and without charge.

Secondly, home videorecording should be deemed fair use because it is not the copying which causes any harm there may be to respondents. The only compensation, if any, a

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9. The opinion of the Court of Appeals is misleading in stating that "[t]he 'noncommercial' characterization of home videorecording is . . . misleading, [because t]he corporate defendants involved in the lawsuit are obviously not in the business of promoting home videorecording for strictly altruistic reasons." 659 F.2d. at 972, n. 9. The *use* to be considered in the fair use determination is solely that of VTR owners. If a VTR owner's use is fair use, petitioners are not liable for contributory copyright infringement, irrespective of their profit motives.

10. *See Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1963); *Encyclopedia Britannica Educational Corp. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978); *compare Williams & Wilkins v. United States*, 487 F.2d 1345 (1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975) (finding of fair use despite public dissemination).

television viewer gives in exchange for a television program is his possible attention to the commercials which accompany it. Conceivably, he may in using a VTR choose to block out these commercials, but it is equally possible that he might employ some other mechanical device to do so, or just turn off his set during the commercials, walk out of the room, or fail to pay attention. No such action can reasonably be deemed to constitute copyright infringement.

Thirdly, the Court of Appeals gives short shrift to the constitutional problems of penalizing home videorecording. This Court has repeatedly held that the freedom of speech guaranteed by the first amendment "necessarily protects the right to receive [communications]." *Kleindienst v. Mandel*, 408 U.S. 753, 762–3 (1972). *See also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–7 (1976). The Court has also recognized a fundamental right of privacy in the home, *see Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives), and has held that laws penalizing the viewing even of pornography in one's home are unconstitutional, as they interfere with this right. *Stanley v. Georgia*, 394 U.S. 557 (1969). A holding that persons who arrange mechanically for the delayed viewing of programs on their own television sets are exposed to copyright infringement damages would be an equal invasion of privacy and freedom in the home.[11] The holding of the Court of Appeals would expose private individuals to penalties for such activity in the future.

Fourthly, the treatment by the Court of Appeals of the "staple article of commerce" issue is clearly erroneous. That discussion of the issue, in pertinent part, follows:

> The district court stated that "Selling of a staple article of commerce—*e.g.*, a typewriter, a recorder, a camera, a photocopying machine—technically contributes to any infringing use subsequently made thereof, but this kind of 'contribution,' if deemed sufficient as a basis for

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11. This is undoubtedly one of the reasons why respondents chose not to seek to hold anyone liable for direct infringement by home recording.

> liability, would expand the theory beyond precedent and arguably beyond judicial management." 480 F. Supp. at 461. This reliance on the "staple article of commerce" theory was inappropriate. Appellees' analogy of videotape records to cameras or photocopying machines may have substantial benefit for some purposes, but does not even remotely raise copyright problems. Videotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Virtually all television programming is copyrighted material.[16] Therefore, videotape recorders are not "suitable for substantial noninfringing use." See 3 Nimmer *supra* § 12.04[A] at 12–39, 12–40.
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> 16. For examples, see Nimmer, *supra*, § 12.–04[A] at 12–39–40.

659 F.2d 975. Review of the Nimmer treatise at the pages cited by the Court of Appeals indicates *at most* that virtually all television programs are *copyrightable*, not copyrighted, material. Moreover, the Court of Appeals misstated the district court's opinion, as the district court merely gave significance to the *underlying rationale* for the patent "staple article of commerce" rule,[16] "[w]hether or not ... the Betamax is capable of 'substantial' noninfringing use."[17] As the district court stated:

> Commerce would indeed be hampered if manufacturers of staple items were held liable as contributory infringers whenever they 'constructively' knew that some purchasers on

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16. In patent law, manufacturers, distributors, retailers and advertisers of staple articles of commerce suitable for substantial noninfringing use cannot be held liable as contributory infringers. See 35 U.S.C. § 271(c); *Aro Manufacturing Co. v. Convertible Top Co.*, 377 U.S. 476 (1964).

17. 480 F. Supp. at 461.

> some occasions would use their product for a purpose which a court later deemed, as a matter of first impression, to be an infringement.

480 F. Supp. at 461.[18]

Furthermore, even if it were deemed that home-use recording of copyrighted material constituted infringement, VTRs *are* nonetheless capable of substantial noninfringing uses: (1) the recording of material where the copyright owners have consented to such recording;[19] (2) the recording of non-registrable material, *e.g.*, programming as to which registration and infringement action is regularly rendered impossible by the erasing of the programming from the tape which had given it tangible form;[20] (3) the recording of non-copyrightable material (*e.g.*, 17 U.S.C. § 105); (4) the recording of material on which the copyright has expired; (5) the playback of pre-recorded videocassettes which are licensed by the copyright owner; and (6) the recording and playback, in conjunction with a home videocamera, of motion pictures made by the VTR owner.

Lastly, as discussed below, although the Court of Appeals' opinion indicates that a court's imposition of a continuing compulsory royalty scheme on members of the VTR industry "may very well be an acceptable resolution" in this case, amici consider it to be a grossly inappropriate remedy. Because the ruling by the Court will affect an entire industry, amici wish to inform the Court in this brief of the their viewpoint respecting the appropriate remedies a district court may impose, assuming, *arguendo*, that a VTR manufacturer,

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18. This Court has indicated in a recent case involving regulation of the sale of drug paraphernalia that penalizing the marketing of products having virtually no other use but an illegal one is permissible, but that regulating or penalizing the sale of neutral articles of commerce (in that case, pipes, paper clips or matches) "may engender concrete problems of constitutional dimension...." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 50 U.S.L.W. 4267, 4271 (March 3, 1982).

19. 480 F. Supp. at 468.

20. 17 U.S.C. § 411(a); 480 F. Supp. at 468.

distributor, or advertiser may be held liable for contributory copyright infringement.

2. INJUNCTIVE RELIEF IS NOT AN APPROPRIATE REMEDY IN THIS CASE

Injunctive relief is one of the two major remedies provided by the Copyright Act.[21] Respondents asked the district court to "enjoin the manufacturer, distributors, retailers and advertiser of a machine used by persons in private homes for allegedly infringing activities".[22] An injunction is an equitable remedy, and its issuance is within a court's discretion. Although an appropriate remedy generally, injunctive relief is inappropriate in this case. "No likelihood of harm was shown at trial, and plaintiffs *admitted* that there had been no actual harm to date."[23]

According to *respondents'* survey, 75.4% of the VTR owners use their machine to record for time-shifting purposes

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21. 17 U.S.C. § 502. The other major remedy provided by the Act is damages, *i.e.*, either actual damages and profits of the infringer (17 U.S.C. § 504(a)(1),(b)) or, at the election of the copyright owner, statutory damages as provided by 17 U.S.C. § 504(a)(2),(c). As further remedies, Congress has also provided for the impounding and disposition of infringing articles (17 U.S.C. § 503) and for costs and attorneys' fees (17 U.S.C. § 505). Respondents have elected to seek statutory damages.

22. 480 F. Supp. at 464.

23. 480 F. Supp. at 468–69. The district court's explanation of its consideration of the evidence of injury in determining whether to issue an injunction is as follows:

> Plaintiffs' request for an injunction against the corporate defendants is unique, and the equitable considerations are different from those found in the typical copyright case. Because the defendant's role in the asserted infringement is indirect, and because defendant's product is also used for purposes where no infringement could be alleged (e.g., recording material which is not copyrighted or where permission to record is given), it is necessary to weigh the evidence of harm offered at trial. The court must consider this evidence in the context of the effect of an injunction in this case.

480 F. Supp. at 465.

half or most of the time.[24] The benefits of time-shifting to the audience are two-fold: (1) a VTR owner can increase access from one to two programs at any given time by viewing one program and recording another for later viewing; and (2) a VTR owner, by recording, can gain access to programs broadcast at times when he would otherwise not be at home to view them, *e.g.*, when he is at work. Despite the respondents' claims of harm from time-shifting,[25] respondents were unable at trial to demonstrate the harm. As the district court correctly noted, "[h]arm from time-shifting is speculative and, at best, minimal. . . .It is not implausible that benefits could also accrue to [respondents], broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts."[26]

As this Court noted in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974):[27]

> By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor. When a

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24. 480 F. Supp. at 438. In addition, *Time* Magazine has reported the results of a survey by Field Research Corporation which found that 75% of VTR owners used their machines to record for time-shifting purposes. *Time*, December 14, 1981, p. 58.

25. The harms claimed by respondents were: "(1) a decrease in the size of the live audience of the time of the telecast; (2) a loss to live television or other [respondents]-sponsored entertainment at the time of viewing the copy; (3) a loss to the rerun audience; and (4) a loss to theater or film rental exhibition of the same program." 480 F. Supp. at 466.

26. 480 F. Supp. at 467.

27. In *Teleprompter*, a suit by copyright owners was instituted against a cable television operator (Teleprompter) for the unlicensed retransmission of television broadcasts of copyrighted works. This Court refused to find copyright liability on the grounds that Teleprompter originated some of its programming; that it accepted advertising for some such programming; that it was interconnected with other CATV systems in carrying certain programs; and that microwave was employed by Teleprompter in some instances for the retransmission of broadcast signals. The Court also rejected copyright liability for distant signals.

> broadcaster transmits a program under license from the copyright holder he has no control over the segment of the population which may view the program . . . but rather he gets paid by advertisers on the basis of all viewers who watch the program. . . . From the point of view of the broadcasters, such market extension may mark a reallocation of the potential number of viewers each station may reach, a fact of no direct concern under the Copyright Act. *From the point of view of the copyright holders, such market changes will mean that the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the CATV market.*

415 U.S. at 412–13 (emphasis added). Likewise, appropriate compensation to the copyright owners can easily be determined based on a calculation of the size of the direct broadcast market augmented by the size of the VTR time-shifted market.[28] Although respondents also argued that harm would result from recording off-the-air and saving the tape for more than one subsequent viewing (*i.e.*, "librarying" the tapes) and the avoidance of commercials through the use of the pause and fast-forward shifting, they have failed to demonstrate any injury from these practices.[29] As the district judge stated:

> This is a doubtful case. An injunction would deprive the public of a new technology capable of noninfringing uses . . .
>
> Courts look for irreparable harm to the plaintiff before issuing injunctive relief, and here plaintiffs' fears of irreparable harm are speculative at best.

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28. Nielsen Ratings has developed the ability to measure when a VTR in a sample home is recording the program. 480 F. Supp. at 441.

29. 480 F. Supp. at 467–68.

480 F. Supp. at 464.[30]

3. A COMPULSORY ROYALTY IS NOT AN APPROPRIATE REMEDY

A compulsory royalty is not an appropriate remedy because: (1) it is not a remedy provided by Congress; (2) as a measure of future damages, a determination of an appropriate royalty is too speculative and uncertain; and (3) a comprehensive royalty scheme is beyond the institutional competence of courts to devise and administrate.

a. A Compulsory Royalty Is Not A Remedy Provided by Congress.

Once the creator of a nondramatic musical work has allowed phonorecords of that work to be produced and distributed, the Copyright Act requires him to grant a license upon request to any other person who proposes to make and distribute phonorecords of the work, at a royalty set by law.[31] In essence, Congress has established "user" fees for the copyrighted nondramatic musical work. This compulsory royalty scheme is one of four, and only four, established by Congress, and the determination of the appropriate royalty rates is one of the principal functions Congress has assigned to the Copyright Royalty Tribunal, "[an] independent [tribunal] . . . in the legislative branch."[32] The Tribunal also has jurisdiction to determine rates applicable to the compulsory royalties for secondary transmissions by cable system,[33] for public

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30. The Court of Appeals, in its remand, directed the District Court "[t]o reconsider this action [the court's denial of an injunction]," but suggests an injunction may be inappropriate "when great public injury would result" and that an acceptable resolution in this context may be the awarding of damages or a "continuing royalty." 659 F.2d at 976.

31. 17 U.S.C. § 115. The payments are known in the trade as "mechanical royalties," reflecting the language of the 1909 Copyright Act, Act of March 4, 1909, ch. 320, § 1(e), 35 Stat. 1075.

32. 17 U.S.C. § 801. The Tribunal is composed of five commissioners appointed for seven-year terms by the President with the advice and consent of the Senate. 17 U.S.C. § 802.

33. 17 U.S.C. §§ 111, 801(b)(2).

performances by coin-operated phonorecord players ("jukeboxes"),[34] and for the use of certain works in connection with noncommercial broadcasting.[35] The Tribunal is also responsible for receiving and distributing royalty fees payable under the compulsory cable and coin-operated phonorecord player licenses.[36] The Tribunal is subject to the Administrative Procedure Act, and is directed to adopt regulations "governing its procedure and methods of operation" and to accompany its final decisions by a statement of "criteria that [it] determined to be applicable to the particular proceeding, the various facts that it found relevant to its determination in that proceeding, and the specific reasons for its determination."[37] The Administrative Procedure Act also governs judicial review of the Tribunal's actions.[38] *See generally Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, No. 80-2273 (D.C. Cir. April 9, 1982).

Congress has not created a compulsory royalty in the VTR area.[39] Congress has not specified a "reasonable royalty" as a remedy for copyright infringement, or as a

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34. 17 U.S.C. §§ 116, 801(b)(1).

35. 17 U.S.C. §§ 118, 801(b)(1).

36. 17 U.S.C. §§ 111(d)(3), 116(c), 801(b)(3).

37. 17 U.S.C. § 803.

38. 17 U.S.C. § 810.

39. Four bills are currently pending in Congress which would specify that private home use of VTR's are exempt from copyright liability — H.R. 4808 (introduced by Rep. Stanford Parris (R-Va.)); S. 1758 (introduced by Senators Dennis De Concini (D-Ariz.) and Alphonse D'Amato (R-N.Y.)); Amendment No. 1242 to S. 1758 (introduced by Senator Mathias); H.R. 5488 (introduced by Rep. Don Edwards (D-Calif.); and H.R. 5705 (also introduced by Rep. Edwards). (Because Senator Mathias' amendment is in the nature of a substitute for the text of S. 1758, it is functionally equivalent to a formal bill.) H.R. 5488 would also provide for payment of royalty fees by manufacturers and importers of videorecorders and blank tapes. The Mathias amendment would provide for payment of royalties by manufacturers and distributors of videorecorders and blank tapes under procedures very similar to those adopted by H.R. 5488. The Mathias amendment, as well as H.R. 5705, differs from H.R. 5488, however, in that it provides for payment of royalties on sales of blank audio tapes as well as on sales of blank tapes used in videorecording.

measure of damages.[40] Furthermore, where it has created a compulsory royalty, Congress has vested primary responsibility and authority to determine a reasonable royalty payment and make distribution thereof to injured copyrightholders in a specialized agency and not in the courts.

In *Fortnightly Corporation v. United Artist Television Inc.*, 392 U.S. 390 (1968),[41] an analogous case in a developing technology at that time, cable television, the Solicitor General in a brief *amicus curiae* had urged the Court to hold that cable television systems "perform" the programs they carry but to "imply" a license for the various cable television performances. The Solicitor General considered this a "compromise decision . . . that would . . . accommodate various competing considerations of copyright, communications, and antitrust policy."[42] This Court, however, declined the invitation, stating: "*That job is for Congress.*"[43]

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40. Cf. 35 U.S.C. § 284 (damages for patent infringement). See *Widenski v. Shapiro, Bernstein, & Co.*, 147 F.2d 909 (1st Cir. 1945) ("in lieu of actual damages" provision of 1909 Act, predecessor of the "statutory damages" provision in 1976 Act, is a substitute for the reasonable royalty rule applied in patent cases).

41. In *Fortnightly*, cable systems operated by Fortnightly in Clarksbury and Fairmount, West Virginia, communities in which normal television reception was limited by hilly terrain, were providing customers with the signal of five television stations that were 52 to 82 miles distant. Fortnightly's cable systems consisted of antennas fixed on hills above the cities with connecting coaxial cables to the cities. In order to transmit the signals efficiently while maintaining and improving their strength, the systems contained equipment to amplify and modulate the signals received, and to convert them to different frequencies. Fortnightly did not edit the programs received nor originate any programs of its own. Subscribers were charged a flat monthly rate unrelated to the extent of usage. United Artists ("UA") held copyrights on motion pictures that were licensed for broadcast on the five television stations carried by Fortnightly's cable systems, but were not licensed by Fortnightly. UA sued Fortnightly for copyright infringement and the issue posed was whether the cable systems had "performed" the copyrighted words within the meaning of the Copyright Act. The Supreme Court held that they had not, and, accordingly, that no liability under the copyright laws had arisen.

42. 392 U.S. at 401.

43. 392 U.S. at 401 (emphasis added).

Fortnightly thus indicates that the Court considers the imposition of royalties for copyrighted works the domain of Congress.

b. As a Measure of Any Future Damages To Respondents, a Compulsory Royalty Determination is Too Speculative and Uncertain.

A compulsory royalty as a remedy for copyright infringement can be considered the equivalent of, or a measure of, prospective liquidated damages, *i.e.*, fair "user" fees for the future. Assuming, *arguendo*, that a district court has a residual equitable power to determine appropriate remedies other than those provided by Congress, the remedy of a compulsory royalty should be precluded, as a matter of law, as too speculative and uncertain in this case to afford an accurate measure of the amount of prospective damage. "[N]o likelihood of harm was shown at trial, and plaintiffs admit that there had been no actual harm to date."[44] The claims of respondents about future injury were determined to be too speculative and uncertain for purposes of the determination of injunctive relief, and are likewise too speculative and uncertain for the purpose of damage calculation. Moreover, the causal links between the sale of particular name-brand VTRs, such as the Betamax, the generalized expectation that VTR owners will record copyrighted works in general, and any injury to the value of the works of an objecting copyright owner in particular are too attenuated. *See, e.g., Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) ("[T]he jury may not render a verdict based on speculation or guesswork"). Here, estimating whether or to what extent any particular manufacturer's VTRs would be used to record any copyrighted works belonging to respondents, and any estimate of the economic harm to respondents such recording might cause, would involve the kind of speculation or guesswork this Court has condemned as a measure of damages in another area of law.

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44. 480 F. Supp. at 468–69.

c. A Court-Imposed Compulsory Royalty is Beyond the Institutional Competence of a Court to Devise and Administrate.

Assuming, *arguendo*, that a district court were to impose a royalty scheme, a determination would have to be made as to the standards to determine a proper royalty. As demonstrated above, a royalty determination as a measure of prospective damages to the copyright owner is too speculative and uncertain, and therefore should be precluded as a matter of law. Standards that are designed to achieve generalized social goals, such as those specified by Congress for the Copyright Royalty Tribunal in which the royalty rates applicable to compulsory licenses are to be calculated,[45] are likewise beyond the institutional competence of a court to establish. To make an accurate determination of a royalty rate, a district court would have to hold hearings, probably over an extended period of time, and to accept evidence from parties other than those before the court.[46] Assuming a district court, nonetheless,

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45. For example, the rate applicable to the phonorecord license is to:

> . . . be calculated to achieve the following objectives:
>
> (A) To maximize the availability of creative works to the public;
>
> (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. § 801(b)(1).

46. The Copyright Royalty Tribunal's experience with determining royalty rates is instructive. For example, the Tribunal published notice of its first proceeding to determine the royalty rate for the phonorecord compul-

could devise a "proper" royalty scheme, it may have to maintain jurisdiction over the action to settle controversies over the distribution of royalty fees, and perhaps monitor the fairness of the royalty rates.[47] Active judicial involvement in such administration will be constrained by the limited expertise and time of federal judges. As recently stated by the United States Court of Appeals for the District of Columbia in a case involving judicial review of distribution of funds collected under a statutorily authorized compulsory royalty scheme, "[c]laims of this sort are generally well beyond the expertise or authority of courts ... and Congress made clear its awareness of our limitations by making the [Copyright Royalty] Tribunal the primary arbiter of these claims." *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, No. 80-2273, at 13 (D.C. Cir. April 9, 1982). *See also United States v. Paramount Pictures*, 334 U.S. 131, 161-166 (1944) (judiciary is unsuited to supervise competitive bidding system).

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sory license on January 2, 1980. 45 Fed. Reg. 63 (1980). During the spring of 1980, the Tribunal accepted submissions of economic studies and legal motions, and *then* commended evidentiary hearings that lasted forty-six days and involved thirty-five witnesses. *See Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords*, 46 Fed. Reg. 10,466, 10,466-67 (1981). Closing arguments followed in November, and the Tribunal published the new rate on January 5, 1981, over a year after it published its initial notice of a proceeding. 46 Fed. Reg. 891 (1981).

47. Compare the Copyright Royalty Tribunal's jurisdiction: The Copyright Act authorizes the Tribunal to settle controversies over the distribution of royalty fees deposited with the Register of Copyrights under sections 111 and 116 whenever the Tribunal determines that such a controversy exists. 17 U.S.C. §§ 801(b)(3), 804(d). Although the Act does not grant the Tribunal continuous jurisdiction to monitor the fairness of royalty rates, the statute does set a precise schedule for initiation and conclusion of proceedings to adjust the rates set. 17 U.S.C. § 804.

CONCLUSION

For each and all of the foregoing reasons, and for the reasons discussed in Sony's petition for writ of certiorari, this Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Ninth Circuit, and should promptly reverse that decision.

Dated: April 27, 1982
New York, New York

Respectfully submitted,

Donald J. Zoeller
(Counsel of Record)
Mudge Rose Guthrie &
Alexander

Attorneys for Amici Curiae
Toshiba Corporation and
Toshiba America, Inc.

Of Counsel:

Joel Davidow
Herve Gouraige
Mitchell B. Nisonoff

Mudge Rose Guthrie & Alexander

Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, *et al.*,
Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. AND WALT DISNEY PRODUCTIONS,
Respondents.

BRIEF OF *AMICI CURIAE* VIRGINIA CITIZENS' CONSUMER COUNCIL, INC., ARIZONA CONSUMER COUNCIL, IDAHO CONSUMER AFFAIRS, INC., ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC., NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP, MINNESOTA PUBLIC INTEREST RESEARCH GROUP, OAKLAND ALAMEDA COUNTY CONSUMER COUNCIL, RHODE ISLAND CONSUMER COUNCIL, THE CENTER FOR CONSUMER AFFAIRS, THE UNITED STATES CONSUMER ASSOCIATION, EDWARD GREENSFELDER, JR., WILLIAM C. McLAUGHLIN, ROBERT McEWEN AND JUDY BRAIMAN-LIPSON ON BEHALF OF VIDEO CASSETTE RECORDER OWNERS AND USERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM A. DOBROVIR
FRED C. ZACHARIAS
Dobrovir, Oakes & Gebhardt
1025 Vermont Ave., N.W.
Suite 1105
Washington, D.C. 20005
(202) 347-8118

Attorneys for *Amici Curiae*

ABS Duplicators • 912 17th St. NW Wash DC • 298-5537

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BRIEF OF *AMICI CURIAE* VIRGINIA CITIZENS' CONSUMER COUNCIL, INC., ARIZONA CONSUMER COUNCIL, IDAHO CONSUMER AFFAIRS, INC., ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC., NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP, MINNESOTA PUBLIC INTEREST RESEARCH GROUP, OAKLAND ALAMEDA COUNTY CONSUMER COUNCIL, RHODE ISLAND CONSUMER COUNCIL, THE CENTER FOR CONSUMER AFFAIRS, THE UNITED STATES CONSUMER ASSOCIATION, EDWARD GREENSFELDER, JR., WILLIAM C. McLAUGHLIN, ROBERT McEWEN AND JUDY BRAIMAN-LIPSON ON BEHALF OF VIDEO CASSETTE RECORDER OWNERS AND USERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Amici curiae, individuals and nonprofit organizations representing present and future video cassette recorder (VCR) owners and users urge the Court to grant certiorari and reverse the Ninth Circuit's decision. This brief is filed with the written consent of all parties, on file with the Clerk.

INTEREST OF AMICI

The Virginia Citizens Consumer Council, Inc. (VCCC), Arizona Consumer Council (ACC), Idaho Consumer Affairs, Inc. (ICA), Association of Massachusetts Consumers, Inc., North Carolina Public Interest Research Group and Minnesota Public Interest Research Group are non-profit, non-partisan, voluntary statewide associations of citizens which advocate and represent the interests of American consumers before courts, legislatures, and administrative agencies and educate the public on consumers' rights. They have active memberships of 560, 1500, 200, 200, 7,000 and 40,000 respectively. VCCC represented consumer interests in the landmark case of *Virginia Citizens' Consumer Council, Inc. v. State Board of Pharmacy,* 425 U.S. 748 (1976). ICA is an affiliate of the Consumer Federation of America which, with 30 million members, is the largest national consumer membership organization in the United States.

Oakland Alameda County Consumer Council (OACCC) and Rhode Island Consumer Council (RICC) are government chartered and funded nonprofit organizations. OACCC serves the 1.1-million residents of Alameda County, CA, with consumer education, complaint assistance and coordination with local businesses and federal, state and local government agencies. RICC was created in 1966 to advocate the interests of Rhode Island's 950,000 citizens on consumer issues, promote consumer education and represent consumers with respect to state and federal regulation and legislation. The Center for Consumer Affairs is incorporated "to advocate legislative reforms in consumer affairs, litigate where appropriate in the public interest, to educate the public generally about consumer matters to make them more effective in the marketplace . . ." in the State of Alabama. The United States Consumer Association has 50,000 members. Its newsletter *Wise Consumer* informs the public about issues of concern to consumers, its Consumer Protection Bureau acts as an advocate for consumers on issues with dealers, distributors and manufacturers of consumer products and its buyer referral and other services enable its members to purchase consumer products, including VCR's, on favorable terms.

Edward Greensfelder, Jr., William C. McLaughlin, Robert McEwen and Judy Braiman-Lipson are residents of Washington, D.C., Western Springs, IL, Boston, MA and Rochester, NY, respectively. Greensfelder and McLaughlin are VCR owners; Greensfelder uses his both in his law practice (e.g., for showing videotapes of surgical operations in preparing for and conducting litigation) and at home, in taping programs for later viewing by himself and his family. McLaughlin uses his VCR for home use exclusively, taping programs for later one-time viewing by himself and his family; he does not keep any program recorded for more than a few days, consistently erasing and reusing his cassettes. McEwen and Braiman-Lipson have used VCR's owned by others and are potential purchasers. All four are consumers and citizens of the United States and oppose the Ninth Circuit's restriction of their right to purchase and use Video Cassette Recorders (VCR's).[1]

[1] VCC, ACC, AMC and RICC as organizations and McEwen as an individual, with others, have organized the Consumer Recording Rights

Each of the amici has a strong interest in the outcome of this litigation. They, their members and those they represent own, use or intend to own or use VCR's in the various ways described in this brief. The Ninth Circuit's decision declared such ownership and use unlawful under the copyright laws, gravely affecting the rights of existing and future owners and users of VCR's.

SUMMARY

I.

The Ninth Circuit's ruling was of breathtaking and unprecedented sweep. It declared ten million Americans, owners and users of VCR's, to be lawbreakers: violators of the copyrights of plaintiff-respondents, movie producers. The decision could deprive Americans of the benefits of a new and useful technology by enjoining future sales of VCR's and video cassette tapes. It could make all presently owned VCR's expensive artifacts by enjoining sale of video cassette tapes. It could result in a prohibitive statutory penalty of $250 for each future use of a VCR. Even more intrusively, the ruling could compel the destruction of cassettes already recorded in the homes of VCR owners and users. And the Ninth Circuit's ruling could result in a federal District Court becoming a judge-created VCR Copyright Royalty Tribunal with the day-to-day duty of imposing royalty fees on VCR's and blank tapes, establishing royalty fees, prescribing how such fees would be collected and from whom and deciding how, to whom and in what amounts those royalties would be disbursed.

II.

The Ninth Circuit's ruling will inevitably abridge VCR owners' and users' constitutionally guaranteed interests in access to information and creative expression; their right to receive, use and communicate information freely committed to the public domain. This Court has long recognized the paramount First

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Committee, as an affiliate of the Home Recording Rights Coalition (HRRC). HRRC is a coalition of VCR and tape owners, users, manufacturers, dealers and distributors and organizations and associations representing them; it has sponsored the preparation and filing of this brief by the amici named in the title.

Amendment interests of the public in matters related to broadcasting, *C.B.S., Inc. v. Democratic National Committee,* 412 U.S. 94, 112-13 (1973); *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 390 (1969), and the precious right of privacy in the home, *Stanley v. Georgia,* 394 U.S. 557, 565 (1969). Yet in violation of these rights the Ninth Circuit's bailiff could intrude into millions of American homes, becoming in fact the cartoonists' fancied "video policeman."

The Ninth Circuit did this in a lawsuit where the plaintiffs collusively had joined a friendly VCR owner and user as a defendant. This precluded any effective, adversary defense of owners' and users' interests and so the Ninth Circuit considered neither the extensive, important uses of VCR's that do not involve the recording of copyrighted materials off-the-air at all nor the vast majority even of recording of copyrighted material for later viewing, which is so performed as to make it fair use under the copyright law.

III.

The Ninth Circuit ordered the district court to consider establishing itself as a royalty tribunal, imposing a "tax" on petitioners and redistributing the money to respondents. That is doubtless the relief respondents seek; only such relief would satisfy their desire for enrichment. But for a court to do this would be to usurp functions committed to the legislative branch by Article II and to overstep the bounds set on the federal courts by Article III. The Court would not merely open but dive head first into a Pandora's box of constant judicial intrusion into the myriad transactions of a number of complex, pervasive industries that touch the lives of Americans many times a day. The court would be forced to weigh developments in a fast-changing field of technology without the benefit of the array of information a legislature needs and can command and without the expertise of a specialized administrative body. And it would be doing so when the Congress has already begun the very legislative process that the Ninth Circuit's decision would short-circuit.

STATEMENT OF THE CASE

Amici adopt petitioners' statement of the case, supplementing it only to highlight the effect of the Ninth Circuit's decision on

VCR owners and users.

Americans have bought more than three million VCR's.[2] Over 10 million Americans use VCR equipment and the number has been increasing.[3] The Ninth Circuit's decision labelled these 10 million as lawbreakers: copyright infringers who "trammel on legally recognized rights in intellectual property", Pet. App. A 19,[4] when they copy TV programs "in their own homes for private noncommercial use," *id.* 12. It held that their use of VCR's was not a "productive use", *id.* 18, based on its assumption that a VCR's only use was "the copying of entertainment works for convenience", *id.* 19, not the copying of "informational type works", *id.* 20. The court seemed to assume that 10 million Americans use VCR's exclusively to record multiple copies of "Chip and Dale/Mixed Nuts", a cartoon program. The court considered this activity to be of "no . . . societal benefit," *id.* 16, and hence could find its ending or penalization by injunction or fine to bear no "deleterious consequences of reduced access." *Id.* 17.

As for relief, the Ninth Circuit had several suggestions. One was statutory damages, Pet. App. A 28, which at the copyright owner's election can be assessed against any "infringer" – that is, any VCR owner or user who copies a work, and in a minimum amount of $250. 17 U.S.C. § 504(c)(1). Although respondents have shown no "measurable monetary damage, economic loss or revenue loss," Pet. App. B 50, if the Ninth Circuit's decision stands respondents could demand fines in future lawsuits that, if each of 3.5 million VCR families had copied only one program, would add to $875 million.

The Ninth Circuit also suggested injunctive relief. Pet. App. A 28. An injunction against future sale of VCR's and blank tapes would deprive 220 million Americans of the benefits of this new technology. Injunction against home use of VCR's involves

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[2] Television Digest (December 14, 1981).

[3] Media Statistics, *The Video Cassette Recorder, Spring 1980*, 7, 27, 28 (July 1980). Note, *Home Videorecording: Fair Use or Infringement?*, 52 So. Cal. L. Rev. 573, 576-77 (1979); "VTR's Breaking and Entering the Home Market," Broadcasting 28, 32 (October 24, 1977).

[4] *Quoting* Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979).

potential intrusions into privacy that are frightening to contemplate. Such intrusions are second in gravity only to the seizure or destruction of recorded tapes in owners' homes, 17 U.S.C. § 503, which the Ninth Circuit did not mention but did not foreclose, Pet. App. A 28.

The Ninth Circuit's last suggestion was judicial creation and administration of a "continuing royalty" system. Citing no authority save a treatise which proposed, hypothetically, "a judicially created compulsory license", the court altogether ignored how a district judge would perform such a function, obtain jurisdiction over every "infringing" VCR user, collect the royalties, distribute them – or defray the expenses of such an effort. Pet. App. A 28-29.

The Ninth Circuit's ruling affects only one brand of VCR's, but if it stands as precedent, all VCR owners and users will be subject to the sanctions of a lawsuit respondents have filed against all other VCR manufacturers. Pet. 7, 12 n. 16 ("the RCA case"). While here a friendly VCR owner was collusively named as a defendant (*see* pp. 7-9, *infra*), in the RCA case no owner/user defendant is named, as respondents seek again to avoid any effective defense of consumers' interests and rights.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Disregarded VCR Users' First Amendment Rights in a Case Where their Interests Were Neither Effectively Presented nor Argued, and Ignored Compelling Evidence Supporting their Interests

A. This Is An Important First Amendment Case

In balancing the competing interests of listeners and viewers against those of broadcasters, this Court has long held that "the right of the viewers and the listeners . . . is paramount," *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *see F.C.C. v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-62 (1955); *F.C.C. v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940). The Court tilts the balance in favor of the "right of the public to be informed," *C.B.S., Inc. v. Democratic National Committee*, 412 U.S. 94, 112-13 (1973), refusing to "countenance monopolization of [the] market [of ideas]". *Red Lion, id.* VCR use, which extends and enhances viewers' receipt of communica-

tion, involves not only these First Amendment interests but also the viewers' "right to . . . observe what he pleases – the right to satisfy his intellectual and emotional needs in the privacy of his own home," *Stanley v. Georgia,* 394 U.S. 557, 565 (1969), and to an "uninhibited marketplace" of programming that suits personal intellectual needs and tastes. *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. at 390.

The Ninth Circuit brushed these significant First Amendment concerns aside in a sentence, holding them "wholly without merit". App. A 19. It dismissed VCR owners' constitutional rights absent effective consumer representation and absent substantial evidence in support of the First Amendment interests involved.

B. The Rights of VCR Owners and Users, the Parties Most Vitally Affected by the Ninth Circuit's Decision, Were Adjudicated in a Collusive Lawsuit.

The Ninth Circuit dismissed the value and importance of home VCR use, branded VCR owners outlaws and approved a not so-fanciful "video police" (see Appendix B to this brief), without any effective opportunity for VCR owner-users to defend their rights. Aside from one brief reference in the district court's opinion (Pet. App. B 43; the Ninth Circuit ignored even this), there was no evidence below of the many non-infringing uses of VCR's. The reason is apparent: respondents collusively excluded real representation of consumer interests from the case.

The only VCR owner-user named as a defendant below was one William Griffiths, "a client of plaintiffs' [here respondents'] law firm" who "consented to being a defendant." Respondents had "waived any claim for damages or costs against Griffiths . . . never expected him to be represented by counsel" and he was not. Pet. App. B 43-44.

Respondents' puppet presented no evidence and made no argument for use of VCR's either as not infringing at all or as fair use (*see* pp. 8-14, *infra*). No lawyer argued the case for VCR owners and users. For the interests of *amici* and 10 million VCR users this was a feigned case, an improper vehicle for judicial resolution of important public issues, lacking the "honest and actual antagonistic assertion of rights" indispensable to the adversary

process. *United States v. Johnson,* 319 U.S. 302, 304-05 (1943), *quoting Chicago & G.T. Ry. Co. v. Wellman,* 143 U.S. 339 (1892).

No matter how vigorous the adversary contest between petitioners and respondents, it could not include adversary presentation of VCR consumers' position on issues directly affecting them, issues that the Ninth Circuit decided.[5] *See McGowan v. Maryland,* 366 U.S. 420 (1961) (store cannot raise consumers' First Amendment challenge to blue law); *Tileston v. Ullman,* 318 U.S. 44 (1943); *see also United States v. Raines,* 362 U.S. 17, 21 (1960). In sum, respondents' collusion placed "the public interest . . . at hazard." *United States v. Johnson,* 319 U.S. at 305.

C. VCR's Have Uses of Significant Value to Society That Are Entitled to First Amendment Protection and Do Not Infringe Copyright

1. Copyrighted Broadcasts and "Time-Shifting"

The only use of VCR's in which respondents have a legitimate interest is the recording of copyrighted programs directly from the air waves. The overwhelming use of VCR's for such off-the-air recording is "time-shifting," onetime recording for later viewing, then erased so the tape can be reused. Pet. App. B 43, 46 (Lowe), 47 (Soule), 47-48 (survey), 81-82, 108-112.

The Ninth Circuit dismissed First Amendment interests by trivializing this use of VCR's. The only example it cared to mention was the recording of a cartoon, "Chip and Dale/Mixed Nuts," a matter of little or no "benefit to society", Pet. App. A 16, and hence unworthy of balancing in First Amendment scales. But a glance at the TV programming available in the Washington, D.C. TV market during a typical week in March 1982 gives a vastly different impression. *See* Appendix A to this brief. Significant informational, educational, scientific and cultural pro-

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[5] Obviously respondents' targets in their infringement campaign are "deep pocket" manufacturers and distributors like petitioners. Yet if VCR use is infringement, VCR users are the primary infringers and petitioners are only "contributory" or derivative infringers. Pet. App. A 26-27. VCR owner-users, if not indispensable parties to this action under Rule 19(a)(2)(i), F.R.Civ.P., were entitled to intervene as of right, Rule 24(a)(2), F.R.Civ.P.

grams abound, whose copying even the Ninth Circuit could not deny benefits society and fits within the "non-profit educational" purposes of criticism, comment, teaching, scholarship, and research protected by the fair use doctrine, 17 U.S.C. § 107, and within the First Amendment interests recognized in *C.B.S., Inc. v. Democratic National Committee* and *Red Lion.*

News and Public Affairs Programming. Besides regular news broadcasts, TV public affairs programming includes interview programs, panel discussions on current events and special documentaries. During the sample week broadcasters offered 51 public affairs broadcasts, including highly respected journalistic series like "The MacNeil/Lehrer Report","This Week With David Brinkley" and "60 Minutes." Special broadcasts ranged in topics from crime to American assessments of Soviet military strength.

Important news events (e.g. Presidential speeches and press conferences) often are broadcast during working hours, as is live coverage of daytime local and national legislative proceedings. VCR's permit working consumers to record and view such programming, enhancing voter knowledge and understanding of public affairs. *See Time Inc. v. Bernard Geis Associates,* 293 F.Supp. 130, 146 (S.D.N.Y. 1968) ("public interest in having the full information available on the murder of President Kennedy" outweighs copyright protection). *See also C.B.S., Inc. v. Democratic National Committee; Meeropol v. Nizer,* 361 F.Supp. 1063, 1068 (S.D.N.Y. 1973).

Scientific Programming. TV is particularly well suited to the presentation of scientific concepts to the layman. The sample week presented six special broadcasts on scientific and environmental topics, including two National Geographic programs, a commemoration of the centennial of Einstein's birth, four programs on health and episodes of the acclaimed series "Nova" and "Life on Earth." VCR's not only enable more of the public to view such programs but make it easier for parents to share them with their children.

Children's Programming. Home recording capability gives parents more control over what their children see. Currently only 20% of children's viewing time is spent watching children's programming. VCR's enable parents to direct their child's viewing towards educational broadcasts aimed specifically at children, like "Sesame Street."

Often programs marvelously suitable for children are broadcast in prime time viewing hours.[6] If they conflict with a program adults prefer or are broadcast after a child's bedtime, a VCR can preserve the program for the child's viewing the next afternoon.

Home recording also offers children themselves more control over what they see, with educational benefit. Dr. John C. Wright of the Center for the Influence of Television on Children has noted that with VCR's "children will be able to stop the program at any time to reflect on what they've seen or look up additional information, or replay a part they didn't understand. . . . This will offer incredible learning opportunities to those kids who don't respond to print media but learn well from images." *New York Times,* March 12, 1981, § 3, at 6, Col. 2.

Religious and Instructional Programming. The sample week included 22 religious programs. The VCR promotes the producer's goal to communicate his message widely. The sample week included broadcasts teaching woodworking, oil painting, home repair, cooking, small business management and exercise. About 500 colleges nationwide broadcast courses for credit.

Artistic, Literary and Historical Programming. Adaptations of literary works, historical dramatizations and programs about creative artists inform and increase exposure to cultural and historical subjects. The week included Evelyn Waugh's *Brideshead Revisited,* Brontë's *Jane Eyre,* a dramatization of the life of Admiral Horatio Lord Nelson, telecasts from the Kennedy Center, the Oakland Symphony Orchestra and the "American Playhouse" series. Broadcasts on artistic or literary subjects included the work of Norman Rockwell and Carl Sandburg, profiles of playwright Lillian Hellman and tenor Luciano Pavarotti and a series on the nature of creativity.

2. Non-copyrighted and Permitted Uses of Broadcasts

The Ninth Circuit assumed that all TV programming was copyrighted; but at least three categories of TV programming are not protected by copyright at all. *See* Pet. at 4-5.

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[6] For example, the commercial network program "The Lion, the Witch and the Wardrobe" from C.S. Lewis' *Chronicles of Narnia* was broadcast between 8 and 9 p.m. EST.

3. Non-broadcast Uses

The Ninth Circuit held that

> [v]ideotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Therefore, videotape recorders are not "suitable for substantial noninfringing use."

Pet. App. A 25-26. It ignored other uses of VCR's that do not involve recording of broadcasts off-the-air.

Respondents urged below that these uses could be accommodated by limiting the sale of VCR's to those suitable only for such uses, those manufactured without tuners.[7] We do not know whether respondents would propose that their injunction against use of the 3.5 million conventional VCR's already sold would exclude non-broadcast uses; but such an injunction would make the "video policeman's" enforcement job more difficult and more intrusive still, peeking over transoms to spy out whether the tuner was in use.

In any case the suggestion misses the point. The many and varied non-broadcast uses of conventional VCR's – which the Ninth Circuit ignored – add to the reasons why VCR's are "staple items of commerce" not subject to condemnation as engines of infringement, *see* Pet. at 23-24 and cases cited at *id.* nn. 22-24. These uses and their potential increasing popularity among conventional VCR owners add to the reasons why this Court should free VCR owners and their machines of the stigma cast by the Ninth Circuit and the burdens that may be imposed on them by its ruling.

Production of Personal Videotapes. Many VCR owners and users use their equipment to produce, film and view their own videotapes of family events.[8] Students may film legal arguments, speeches, debates, theatrical roles and the like, enabling them to critique and to improve their performance. Sales of portable VCR units doubled from 1980-81 and are steadily increasing. It is

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[7] The electronic components permitting receipt of broadcast signals.

[8] *See* Time, *Home Video Market; Blank and Prerecorded Software Interests,* 38 (June 1979). *See also* Media Statistics, *The Video Cassette Recorder, Spring 1980,* 3, 10 (July 1980).

estimated that 80% of portable VCR purchasers will buy videocameras. 21 *Television Digest* 50 (December 14, 1981).

Viewing of Prerecorded Videotapes. Sale and rental of prerecorded video cassettes and tapes is increasing, *see* Pet. App. B 112. One of respondent Universal's competitors, Twentieth Century Fox, has already released fifty motion picture cassettes or tapes for use with VCR's in the home. *Id.* Between 40% and 50% of VCR owners have purchased or rented prerecorded video programs.[9] *See* Corporation for Public Broadcasting, *Home VCR Owners' Use of Television and Public Television: Viewing, Recording & Playback* at 17 (March 15, 1980); Media Statistics, *The Video Cassette Recorder, Spring 1980* at 10 (July 28, 1980); Time, *The Home Video Market; Blank and Prerecorded Software Interests,* 27 (June 1979). Prerecorded instructional cassettes are available on varying subjects, e.g., first aid, child, pet and plant care, home and automobile repair, cooking, exercise, dance, speed-reading and tennis. Cassettes of historical interest like out-dated newsreels and current news documentaries now are available because of VCR's.

Professional Uses. Many professions use VCR's. Educators videotape courses for students to earn college credit at home.[10] Training programs in government and industry rely on VCR equipment. Instructors and coaches of golf, tennis, skiing, swimming and other sports tape their students' performance to assist them in improving technique. Lawyers videotape depositions,[11] trial practice instructors record student performances for purposes of critique and lectures at bar conferences and continuing legal education courses are recorded and widely disseminated.

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[9] *See also* Time, *Home Video Market; Blank and Prerecorded Software Interests,* 27-33 (June 1979).

[10] *See* Note, *Home Videorecording: Fair Use or Infringement?,* 52 So. CAL. L. REV. 573, 585 (1979), citing Conference on Video Recording for Educational Uses, Final Report, Working Group 2, at 1 (July 21, 1977).

[11] Two Presidents have given testimony by videotape: Jimmy Carter to a Grand Jury investigating swindler Robert Vesco and Gerald Ford to the court at the trial of "Squeaky" Fromm for her assassination attempt.

Flamboyant lecturers like Irving Younger tape and distribute lectures throughout the country, giving thousands of students studying for their bar examinations brief respite from the drudgery of their everyday instruction.[12]

In medicine, videotapes of surgery are preserved for research and treatment purposes (and in anticipation of malpractice litigation). The American Medical Association's Continuing Medical Education Program distributes videotape courses on medical advances to physicians who do not have access to teaching institutions. Medical students receive videotape instruction in such disciplines as radiology, orthopedics, pediatrics and advanced neuroanatomy. At the Georgetown University Medical Center, for example, it is estimated that the average medical student will view videotapes eight times a year.[13] One hospital has developed a program for recording group therapy sessions with adolescent cancer victims. Tapes are later used in the analysis of individual group members, and may be distributed for the benefit of subsequent cancer victims.

* * *

In testimony before the Senate, the Deputy Director of the National Citizens Committee for Broadcasting summarized:

> VCRs are useful tools with many functions: with a hand-held camera, a mother can capture her daughter's first steps on video; after a trip to the public library or the video rental store, a family can watch a recent feature film or a Bogart classic in the comfort of their living room; a laborer can set the timer on his VCR before leaving for work on second shift, return home after midnight, and watch several hours' worth of prime-time television at his own prime time. Consumers deserve protection in all these endeavors. Many of the uses of VCRs raise no copyright questions whatsoever. And many uses of copyrighted materials raise

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[12] Appendix C reproduces a current brochure of the Bureau of National Affairs, Inc., advertising continuing legal education courses on videotape.

[13] Conversation with Ass't Librarian for Public Information Services of Georgetown Medical School.

> no question as to their "fairness." In the long run, no good whatsoever can come from banning the use of VCRs, as some would suggest.

Testimony of Joseph Waz, Hearings on S. 1758 before the Senate Judiciary Committee, 97th Cong., 1st Sess. 2-3 (November 30, 1981).

II. The Ninth Circuit's Decision Would Create An Unconstitutional Encroachment On The Legislative Branch

A. Congress Has Entered The Arena

The decision below holds VCR owners and users hostage to the covetousness of one motion picture producer[14] for a windfall share in the profits of a new technology, earned by the invention and investment of others. It is a windfall because the respondents long ago bargained away the TV rights to all the specific productions at issue.[15]

Not even the Ninth Circuit has seriously disputed that the issue of whether respondents should share in the profits is preeminently meet for legislative resolution. *See* Pet. App. A 18; note, *Universal City Studios, Inc. v. Sony Corp.: "Fair Use Looks Different on Videotape," 66* VA. L. REV. 1005, 1024-27 (1980). Indeed, the legislative process is well under way, *e.g.* H.R. 4783 (October 20, 1981), H.R. 4794 (October 20, 1981), H.R. 4808 (October 21, 1981), S. 1758 (October 21, 1981), Amendment No. 1242 to S. 1758 (December 16, 1981), Amendment No. 1242 to S. 1758 (December 16, 1981) (97th Cong., 1st Sess.). Senate[16]

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[14] While there are two respondents here, Disney and Universal, Disney did not join as a plaintiff in the RCA case.

[15] Whether VCR technology will in the long run affect respondents' profits could not be established in the lower court. Pet. App. B 50, 103-15. *See, e.g.,* Comment, *All's Fair In Love And Private Videorecording,* 30 CATH. U. L. REV. 621, 628-32 (1981); Note, *Home Videorecording: Fair Use or Infringement?,* 52 SO. CAL. L. REV. 573, 574-86 (1979). VCR's presumably increase the number of viewers who watch a broadcast, thus increasing its value to advertisers and enabling producers like respondents to bargain for a higher royalty from the networks.

[16] Hearings before the Senate Judiciary Committee on S. 1758, November 30, 1981, April 21, 1982.

and House[17] hearings have been held.

Some of the bills simply reverse the Ninth Circuit's decision. One, Amendment No. 1242 ("the Mathias Amendment"), would establish a compulsory license for VCR's and blank tapes and refer to the Copyright Royalty Tribunal established by 17 U.S.C. § 801 the task of determining the amount, method of collection and distribution of royalties for the compulsory license — precisely the task that the Ninth Circuit would have the district court perform. Pet. App. A 28-29.

B. The Most Likely Relief To Be Sought Below, a Judicial Royalty System, Is Unconstitutional

Respondents were unable to show any actual loss of profits; an accounting therefore would avail them little. This is not a pirating case, where seizure is an effective remedy for copyright holders, *see Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972). Injunction against sale of VCR's and tapes would destroy an industry and deprive Americans of an important technology but would not put another dollar into respondents' pockets nor foster additional "sales" of an authentic instead of a copied item, *see Dollcraft Industries, Ltd. v. Well-made Toy Mfg. Co.*, 479 F.Supp. 1105 (E.D.N.Y. 1978). Only the Ninth Circuit's unprecedented compulsory licensing scheme is likely to provide respondents with any economic benefit, a share in VCR and tape manufacturers' and sellers' earnings.

Whether or not such an economic transfer is fair in the abstract, it is not the kind of decision the courts can effectively make or once made administer, and this is an area that the Constitution forbids the courts to meddle in. The Ninth Circuit's judicially created, administered and enforced royalty scheme would usurp the functions of Congress and the Executive branch. Of course no court has ever gone so far in donning both legislative and executive hats in a scheme for continuous regula-

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[17] Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee on H.R. 4808 and H.R. 5705, April 12-14, 1982 (in Los Angeles).

tion and adjustment of competing economic interests. But cases where this Court has struck down lesser judicial intrusions into other branches' realms demonstrate the Constitutional whimsy of the Ninth Circuit's notion. For example:

In *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442, 444 (1923), the Court declined Congress' invitation "to revise the legislative discretion of the [D.C. Public Utilities] commission . . . and enter the order it deems the commission ought to have made," holding that "[s]uch legislative or administrative jurisdiction . . . cannot be conferred" upon the judicial branch. Article III does not extend to such "administrative or legislative issues or controversies." The Court followed *Keller* in *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930), refusing, on Article III grounds, to exercise power Congress sought to confer on the courts to decide whether renewal of a broadcast license would serve the "public convenience, interest and necessity." *Id.* 466. The Court held that the function was "purely administrative," *id.* 467, that the case was an "administrative proceeding" and that it was improperly called upon to "exercise or participate in the exercise of functions which are essentially legislative or administrative," *id.* 469. In *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952), the D.C. Circuit set licensing conditions and ordered the Federal Power Commission to carry them out. This Court chastised the court of appeals for "usurp[ing] an administrative function" and rendering "an administrative, not a judicial decision." *Id.* 20, 21.[18]

Questions of patent and copyright policy are expressly confided to the Congress. U.S. Constitution, Article I, § 8. In particular, as this Court has held, such monopoly rights should not be expanded absent the clearest Congressional intent, *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 531, 532 (1972), especially where new industries are concerned. *Parker v. Flook*, 437 U.S. 584 (1978). Here a new communications technology has created potential "shifts in current business and consumer relationships . . . Detailed regulation of these relationships, and any

[18] The principles of these cases still stand. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 580 (1962); FPC v. Transcontinental Gas Pipe Line, 423 U.S. 326, 331-34 (1976).

ultimate resolution of the many sensitive and important problems in this field, must be left to Congress." *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 414 (1974).[19] Any regulation of the use and economic rewards of VCR technology will affect the future of numerous industries[20] and millions of consumers. Resolving the whethers and hows of compensation to copyright holders "entail[s] extensive factfinding and a legislative, rather than a judicial, judgment." *Teleprompter*, 415 U.S. at 413 n. 15. Politics, economics, and the details of technology and science all bear on the proper resolution of the many questions involved; which, as the Court noted in another context, "are delicate, complex, . . . involve large elements of prophecy" and require "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility," long held "to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). *See also Baker v. Carr*, 369 U.S. 186, 210 (1962); *Coleman v. Miller*, 307 U.S. 433, 454 (1939); *The Cherokee Nation v. Georgia*, 5 Pet. 1, 20 (1831).

C. The Courts' and Congress' Treatment of Cable TV Illuminate the Ninth Circuit's Error

Fourteen years ago, in the seminal case that helped prompt the 1976 amendments to the Copyright Act,[21] the Court declared that it is not the courts' task "to accommodate various competing considerations of copyright [and] communications . . . policy . . . . That job is for Congress." *Fortnightly Corp. v. United Artists*

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[19] *See also* Diamond v. Chakrabarty, 447 U.S. 303 (1980) ("The choice . . . is a matter for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot"); Gottshalk v. Benson, 409 U.S. 63, 73 (1972) ("If these programs are to be patentable, considerable problems are raised which only committees of Congress can manage . . . ."). *See also Parker v. Flook*, 437 U.S. at 596.

[20] *E.g.*, the television networks, television broadcast producers, the motion picture industry, VCR manufacturers, manufacturers of VCR accessories such as tapes, VCR distributors and retail and wholesale appliance outlets.

[21] *See Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. at 414 n. 16.

Television, Inc., 392 U.S. 390, 401 (1968). VCR time-shifting, like the cable TV technology this Court wrestled with in *Fortnightly* and *Teleprompter*, "no more than enhances the viewer's capacity to receive the broadcaster's signals". *Fortnightly*, 392 U.S. at 399 (footnotes omitted). As with cable, "the basic function [VCR] equipment serves is little different from that served by the equipment generally furnished by a television viewer." *Id.*

The interplay of the Court, the Congress and the Commission in the cable TV controversy is a model for the proper disposition of the VCR controversy. The Court held in *Fortnightly* and *Teleprompter* that the difficult questions at issue were for Congress, not the courts to resolve and reversed lower court rulings finding copyright infringement. Congress then acted, established a comprehensive scheme and delegated its detailed regulation to the Federal Communications Commission, 17 U.S.C. § 111. The Commission decided to allow cable transmission of TV broadcasts of syndicated programs (*e.g.*, reruns like "I Love Lucy") because "consumers would be decidedly better off" with "increased viewing options from the greater availability of expanded cable services," and the court affirmed. *Malrite T.V. of New York v. F.C.C.*, 652 F.2d 1140, 1145-46 (2d Cir. 1981). Here the Ninth Circuit proposes to have the district court perform the legislative and regulatory roles, embroiling it in a task for which a court is wholly unfitted.

D. The District Court Lacks The Capacity To Administer the Ninth Circuit's Royalty System

The Ninth Circuit's royalty system would plunge the district court into a routine of daily intervention into the lives of VCR owners and users and the everyday business decisions of VCR equipment manufacturers, television broadcasters, and the networks. It would open a Pandora's box of judicial regulation, but without the information, resources and investigative tools for weighing developments in new technology that the legislature commands.

The amounts to be collected and distributed are wholly speculative. The district court has found it impossible to predict

the harm to producers from continued, untrammeled VCR use.[22] Pet. App. B 50, 107-15. VCR's may even increase their profits. *Id.* 112, 113; *see Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. at 412-13; Marsh, *Betamax and Fair Use: A Shotgun Marriage,* 21 SANTA CLARA L. REV. 49, 76 (1981); Comment, 30 CATH. U. L. REV. at 627-32, 651; Note, *Home Videorecording: Fair Use or Infringement?,* 52 So. CAL. L. REV. 573, 617 (1979). The court lacks the legislature's ability to marshal expertise in communications, engineering, computer technology, marketing, economics and other disciplines, necessary to make judgments and predictions of harm and especially to evaluate them in money terms. A court is even less capable of determining how and to whom to distribute collected royalties, still less to administer collection and distribution of the money.

The Ninth Circuit would have the district court become — or create and supervise — a self-defining bureaucracy, acting without legislative standards as it is faced with new products, new communications technology,[23] new methods of broadcast marketing and the like, and without any source of appropriated funds to defray the probable great expense of this endeavor.

The U.S. Register of Copyrights has put the matter sharply:

> When law and broad policy are created judicially, policy often emerges piecemeal by small accretions of

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[22] One comment puts it:

> The actual harm to plaintiffs is difficult, if not impossible, to ascertain. Although the ratings services may be able to measure the amount of home videorecording, the court would have to fashion any restitutional remedy to apportion the damages among the various producers in relation to the harm sustained. That any such system would have to take into account the number of times viewers watched a particular show compounds the problems.

Note, Universal City Studios, Inc. v. Sony Corp.: "Fair Use Looks Different on Videotape," 66 U. VA. L. REV. 1005, 1024 (1980).

[23] *E.g.*, the backyard satellite dish antenna which can pick up broadcasts from anywhere in the world. How would the district court deal with claims for a royalty share filed by the BBC or Polish National TV?

> precedent. Or, in an effort to achieve legislation-like results, courts issue broad declarations that rest only on the particular facts of the given case. These shortcomings need to be carefully considered because the courts are moving to apply the test of fair use to private taping and other copyright problems created by new technologies. The result may be the emergence of broad policies without any clear legislative guidance.

Ladd, *Home Recording and Reproduction of Protected Works,* 68 A.B.A.J. 41, 43 (1982).

CONCLUSION

Having disposed of the rights of millions of American consumers without their participation, convinced of the frivolous nature of VCR use, bemused by a theoretical judicial construct of a "compulsory license" that would be an administrative nightmare and treading a field reserved to the Congress, the Ninth Circuit issued a decision that is a Frankenstein's monster. This Court should grant certiorari and reverse.

Respectfully submitted,

WILLIAM A. DOBROVIR
FRED C. ZACHARIAS
Dobrovir, Oakes & Gebhardt
Suite 1105
1025 Vermont Ave., N.W.
Washington, D.C. 20005
(202) 347-8118
Attorneys for *Amici Curiae*

APPENDIX A

Selected Television Programs in the Washington, D.C. Area March 6-12, 1982*

1. *News and public affairs programming*

U.S. House of Representatives Proceedings
Virginia Legislature '82
Community Update
Today's Black Woman
Today
Good Morning America
CBS News (Morning)
MacNeil/Lehrer Report
Phil Donahue
Good Morning Washington
Morning Break
Dick Cavett
Firing Line
Nightly Business Report
Nightline
American Interests
Evening Exchange
Washington Week in Review
Wall Street Week
Agronsky & Company
20/20
NBC Magazine

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*T.V. Guide, March 6, 1982 (Washington-Baltimore Edition), at A-13-A-103. Includes broadcasts over WRC, WTTG, WJLA, WDVM, WDCA, WETA, and WHMM in Washington, D.C. and WNVT in Annandale, Va.

Assignment 7
CBS News Sunday Morning
Face the Nation
This Week With David Brinkley
Louis Rukeyser's Business Journal
Meet the Press
Revista
Inside Washington
Everywoman
It's Your Business
Latin Tempo
Open Mind
Over Easy
Great Decisions '82
Common Cents
Lawmakers
Tony Brown's Journal
Black-Stream
Black Forum
Newsweek Bureau Report
Newsprobe
60 Minutes
"Crisis Alert: Agony of East Africa"
"Black Man's Land"
"The Red Army"
"Tenement"
"America's Battle With Crime"
"Frank Terpil: Confessions of a Dangerous Man"
"Behind the Giant"

2. *Scientific programming*

Consultation
Health Field
Richard Simmons

Body Works
"Neuron Suite"
"River of Sand"
"Einstein's Universe"
National Geographic: "Polar Bear Alert"
"The Sharks"
"Cousteau Odyssey"
Life on Earth, Parts 8 and 9
Nova, "Palace of Delights"

3. *Children's programming**

Captain Kangaroo
Great Space Coaster
Wow!
Romper Room and Friends
Sesame Street
Mister Rogers
Electric Company
Krofft Superstars
3-2-1 Contact
Polka Dot Door
Children's Mystery Theater
Walt Disney
Once Upon a Classic
Villa Alegre
Vegetable Soup
Kid's Break
New Voice
Newsbag
Big Blue Marble
Rainbow Patch

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*Excludes children's entertainment such as non-educational cartoons.

4. *Religious programming*

Herald of Truth
Directions
For Our Times
World Tomorrow
Jimmy Swaggart
Freedom Revival Hour
700 Club
Day of Discovery
Ever Increasing Faith
Bauman Bible Telecast
Oral Roberts
Jerry Falwell
Rex Humbard
It Is Written
Sunday Mass
Robert Schuller
Hour of Prayer
Jack Van Impe
Jim Bakker
Ernest Angley
Kenneth Copeland
Billy Graham Crusade

5. *Instructional programming*

Morning Stretch
Lilis, Yoga and You
Yoga with Priscilla
Woodwright's Shop
Market to Market
Quilting
This Old House
Small Business Management
Magic of Oil Painting

Basic Banjo
Antiques
Cooking Cheap
Growing Years
Making it Count
Signing with Cindy
Hobby Shop

6. *Artistic, literary and historical programming*

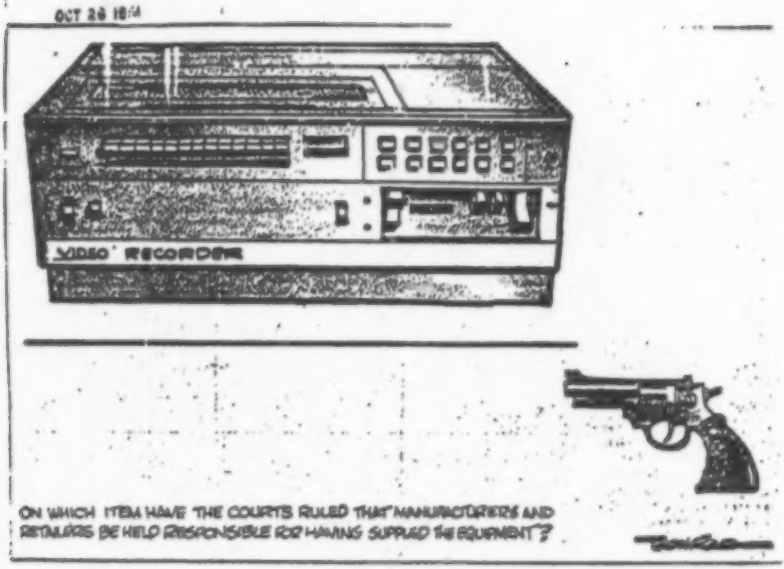
Creativity with Bill Moyers
Profiles in American Art
Kennedy Center Tonight
Over Easy
"Black Contributions"
American Playhouse: "Carl Sandburg – Echoes and Silences"
"For Colored Girls Who Have Considered Suicide/When the Rainbow is Enuf"
"Edwin Hawkins at the Symphony"
"Marx Brothers in a Nutshell"
"Lights! Camera! Annie!"
"Pavarotti: King of the High C's"
"Normal Rockwell's World"
"Lillian Hellman: A Profile"
"Jane Eyre"
"I Remember Nelson," Parts 2 and 3
"Brideshead Revisited," Parts 7 and 8

APPENDIX B

Selected Newspaper Cartoons

PHILADELPHIA, PA.
INQUIRER
D. 418,148—S. 644,472
PHILADELPHIA METROPOLITAN AREA

OCT 28 19



ON WHICH ITEM HAVE THE COURTS RULED THAT MANUFACTURERS AND RETAILERS BE HELD RESPONSIBLE FOR HAVING SUPPLIED THE EQUIPMENT?

Washington Post Oct. 31, 1981
"The Drawing Board Op. ed. page
Philadelphia Bulletin Oct. 21, 1981

3b.

LONG ISLAND, N.Y.
NEWSDAY
D. 407,750—S. 543,825
NEW YORK CITY METROPOLITAN AREA

OCT 22 1

Asbury Park, N.J. Press - Oct. 24, 1981

ALRIGHT - WE KNOW YOU'RE IN THERE - TURN OFF YOUR VIDEO TAPE RECORDER AND COME OUT WITH YOUR HANDS UP...'

ROCKFORD, ILL.
MORNING REGISTER-STAR
D. 77,778—S. 82,041
ROCKFORD METROPOLITAN AREA

NOV 1 19

FRESNO, CA.
BEE
D 131,000 — S 153,000
FRESNO METROPOLITAN AREA
OCT 27 1981

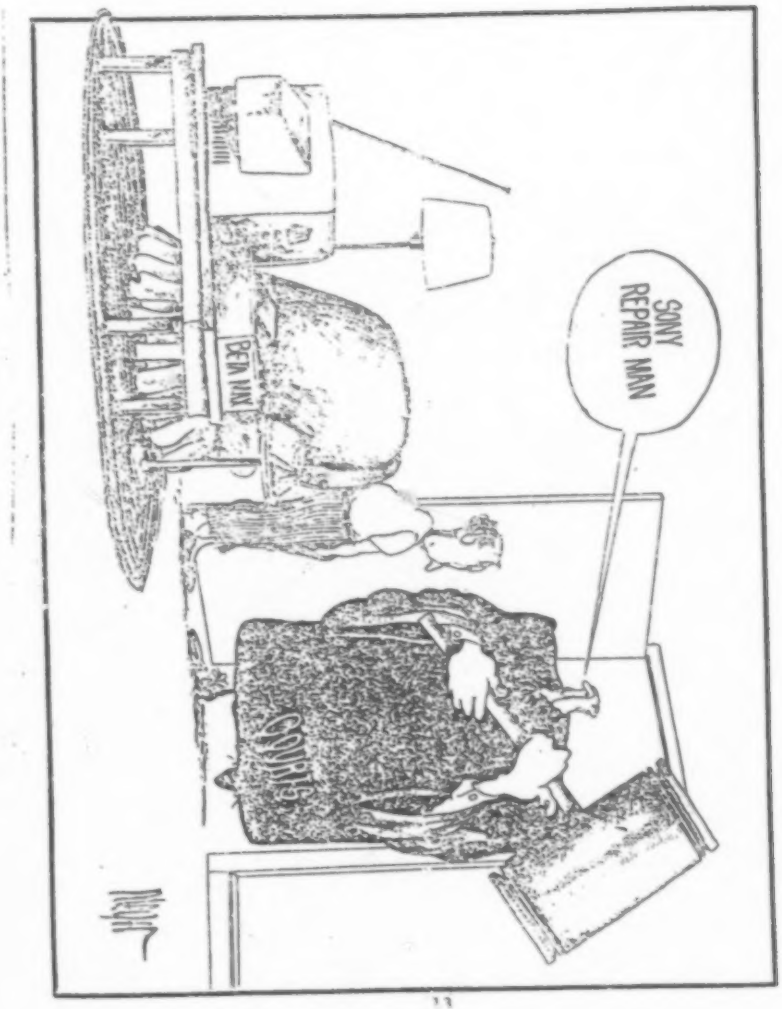
'OPEN UP! This is the Copyright Squad and we know you have a video recorder, office copier and cassette tape deck!'

MATTOON, ILL.
JOURNAL-GAZETTE
D. 12,191

OCT 30 IS #

"WELL, MAYBE IT IS ONLY A DUCK HEADING NORTH FOR THE WINTER... BUT WE BETTER NOT RECORD 'THE WONDERFUL WORLD OF DISNEY' UNTIL WE'RE SURE!"

San Francisco Chronicle Oct. 21, 1981

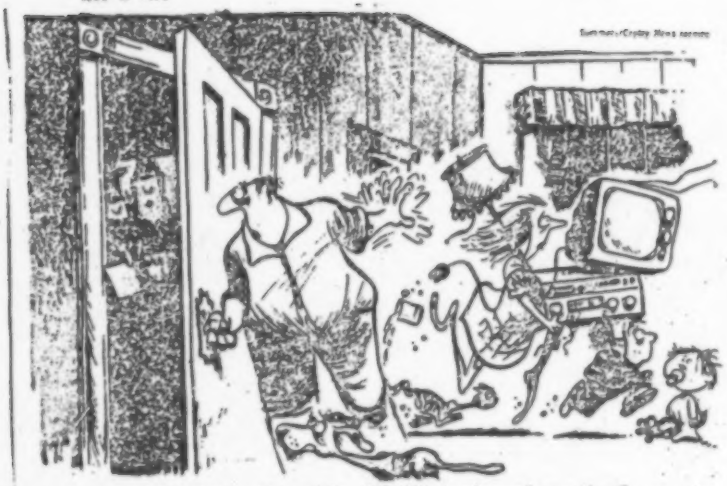


POULSBO, WA.
HERALD
W. 7,400
KITSAP METROPOLITAN AREA

OCT 26 [illegible]

PHOENIX, ARIZONA
GAZETTE
D. 110 000
PHOENIX METROPOLITAN AREA

NOV 6 1981



"Metro Police . . . Betamax Squad! We'd like to ask you a few questions."

11b.

Return to: The Bureau of National Affairs, Inc.
Videotape Programs, Suite 5-602
1231 25th Street, N.W., Washington, D.C. 20037

I wish to obtain the _____ (title of program)
videotape program for a one-time showing on _____ (date)
and will need approximately _____ courseboks. Please contact me immediately concerning the estimated shipping charges and other particulars. The address for shipping the program and books (if different from name and address below) is:

_____

_____

I wish to **purchase** the following audio/videotape programs and/or courseboks:

☐ Payment enclosed, including applicable state sales tax. (BNA pays shipping charges.)

☐ Bill later, plus shipping charges and applicable state sales tax.

Federal Bankruptcy Code
Videotapes **$750** (includes 1 courseboek)
Audio Cassettes **$65**
Audio Cassettes plus 1 courseboek **$125**
_____ copy/copies of courseboek alone (**$60** per copy. See multiple-copy discount rates listed under Ordering Information.)

The Trial of an EEO Case
Videotapes **$500** (includes 1 courseboek)
Audio Cassettes **$50**
Audio Cassettes plus 1 courseboek **$100**
_____ copy/copies of courseboek alone (**$60** per copy. See multiple-copy discount rates under Ordering Information.)

Divorce Taxation
Audio Cassettes **$65**
Audio Cassettes plus 1 courseboek **$125**
_____ copy/copies of courseboek alone (**$50** per copy. See multiple-copy discount rates listed under Ordering Information.)

(Please print or type)

NAME _____

ORGANIZATION _____

ADDRESS _____

CITY _____ STATE _____ ZIP _____

TELEPHONE (AREA CODE) _____

SIGNATURE _____

ORDERING INFORMATION

Rental Plan

All three videotape programs are available for a one-time showing at *no rental charge*. You need only pay round-trip express shipment costs of the videotapes and purchase a courseboek for each viewer (minimum—10 books), plus shipment and return of unused courseboeks. A courseboek multiple-copy discount of at least 15% is available, as shown below.

Courseboek	List Price
Federal Bankruptcy Code	$60
The Trial of an EEO Case	$60
Divorce Taxation	$50

Quantity	Discount
10-24 copies	15%
25-49	20%
50-99	25%
100-499	30%
500-999	35%
1000 or more	40%

Purchase Plan

Federal Bankruptcy Code: Theory Into Practice
Videotape: $750 (includes 1 courseboek)
Audio Cassettes: $65
$125 (includes 1 courseboek)

The Trial of an EEO Case
Videotape: $500 (includes 1 courseboek)
Audio Cassettes: $50
$100 (includes 1 courseboek)

Divorce Taxation
Audio Cassettes: $65
$125 (includes 1 courseboek)

Format

¾" U-Matic videotape (With advance notice, 12" VHS or Betamax tapes can be provided.)

The Bureau of National Affairs, Inc., present

Continuing legal and professional education

courses now on videotape

Rental or Purchase

A convenient and economical means for your organization to sponsor valuable continuing education programs with outstanding facilities

12b.

This unique, six hour videotape program provides practicing attorneys, accountants, credit managers and other members of the financial community with an in-depth analysis of the Bankruptcy Reform Act of 1978 (the Bankruptcy Code). The program examines in detail the effect of the Code on the bankruptcy court and the rights not only of debtors, but also of creditors and trustees. The emphasis is on consumer bankruptcies: a consumer liquidation case is followed through all its phases—petition filing through case closing. Attention is also paid, however, to business liquidation cases, to business reorganization under Chapter 11, and to the adjustment of debts of individuals with regular income under Chapter 13.

The program is presented in lecture form by Judge Grady L. Pettigrew, supplemented with discussions, comments, and contributions by real-life representatives of banks, credit unions, and other financial institutions. The lecture and discussions are accompanied by visuals of necessary documents in order to enable attorneys and others concerned with bankruptcy proceedings to relate the material to their day-to-day practice.

Judge Pettigrew is a judge of the United States Bankruptcy Court, Southern District of Ohio, Eastern Division. He has served in this capacity since 1977. Before his appointment to the bench, Judge Pettigrew practiced law in Columbus, Ohio, specializing as a trial lawyer in civil litigation. He is an adjunct professor of Law at The Ohio University College of Law and the Law School of Capital University. (Length of videotape program—6 hours)

Coursebook list price $60.00 392 pp.

This 1980 videotape program is designed to provide a concise, complete course of equal value to the general practitioner, divorce specialist, and accountant. The course begins with the basics and progresses through the highly sophisticated aspects of tax law, thus offering a thorough briefing for the attorney or tax advisor. Topics covered include: Tax Aspects of Dependency Exemptions, Property Divisions and their Tax Impact, Tax Planning for Property Transfers, Dividing a Closely Held Business, Estate and Gift Tax Planning for Divorce, Treatment of Retirement Plans and Employment-Related Benefits in Divorce, and Deductibility of Legal Fees in Divorce Situations. (Length of videotape program—5½ hours. Videotape available only on rental plan.)

Faculty—Bernice A. Anglea, Anglea & Boisoli, Pasadena, California; Donald F. Grande, CPA, Arthur Young & Company, Milwaukee, Wisconsin; David H. Hopkins, McDermott, Will & Emery, Chicago, Illinois; Leonard L. Loeb, Milwaukee, Wisconsin; Marjorie A. O'Connell, O'Connell & Associates, Washington, D.C.; James J. Pudell, Pudell, Peterson & Pudell, S.C., Milwaukee, Wisconsin; Professor Gary C. Randall, Gonzaga University Law School, Spokane, Washington; and John Y. Taggart, Windels, Marx, Davies & Ives, New York, New York.

Coursebook list price $50.00 336 pp.
(Coursebook includes 1982 update)

This [illegible] videotape [illegible] cases (one [illegible] UCC and Labor [illegible] choose to focus on the [illegible] players who turn [illegible] or an educational requirement, determining appropriate procedure [illegible] analyzing the available laws [illegible] area, and evaluating the different [illegible] structured work [illegible] final participants are exposed [illegible] other days, and expert witness [illegible] to at and legal insight into the [illegible] tion of employment.

In addition [illegible] lecture [illegible] course the case presented [illegible] determination and conducted [illegible] be learned. (Length of [illegible] 10½ hours)

Coursebook list price $60.00 Volume I, 492 pp. Volume II, 376 pp.

Amicus Brief

21

Office - Supreme Court, U.S.
FILED
MAY 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1687

IN THE

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief of Amici Curiae Writers Guild of America, West, Inc.; Writers Guild of America, East, Inc.; Screen Actors Guild, Inc.; and Directors Guild of America, Inc., in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ELLIOTT L. WILLIAMS
7950 Sunset Boulevard
Los Angeles, Calif. 90046
213 656-1220
Attorney for Directors Guild of America, Inc.

PAUL S. BERGER
BERGER, KAHN, SHAFTON & MOSS
11620 Wilshire Boulevard
Sixth Floor
Los Angeles, Calif. 90025
213 478-6032
Attorneys for Screen Actors Guild, Inc.

PAUL P. SELVIN
SELVIN AND WEINER
A Professional Corporation
1900 Avenue of the Stars
Suite 2400
Los Angeles, Calif. 90067
213 277-1555
Attorneys for Writers Guild of America, West, Inc.

JEROME B. LURIE
COHN, GLICKSTEIN, LURIE, OSTRIN, LUBELL & LUBELL
1370 Avenue of the Americas
New York, New York 10019
212 757-4000
Attorneys for Writers Guild of America, East, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Interest of Amici Curiae.

The above named amici, by their attorneys, respectfully file this Brief of Amici Curiae in opposition to the Petition for Writ of Certiorari of Sony Corporation of America ("Sony").*

Amici are the collective bargaining representatives of thousands of individuals who create or contribute to the production of motion pictures and television films. Amici are collectively referred to hereafter as the "talent Guilds." The members of each amicus will be significantly affected by this case. More specifically:

*Consent of the parties has been granted. Copies thereof are on file with the Court.

THE WRITERS GUILD OF AMERICA, WEST, INC. and WRITERS GUILD OF AMERICA, EAST, INC., (both hereafter simply "WRITERS GUILD") are the collective bargaining representatives for all writers who are employed to write motion pictures and the entertainment portion of television programs. WRITERS GUILD members also sell literary materials for use in motion pictures and television. These writers are the creators of the dramatic shows, series, documentaries, motion pictures, and other programs which dominate television.

THE SCREEN ACTORS GUILD ("SAG") is the collective bargaining representative for all actors who are employed in motion pictures or films for television. SAG has over 50,000 members. These actors appear in the dramatic shows, series, motion pictures, and other programs which dominate television.

THE DIRECTORS GUILD OF AMERICA, INC. ("DGA") is the collective bargaining representative for directors, unit production managers, assistant directors, associate directors and stage managers who are employed in the production of motion pictures and television programs. Motion pictures and television programs cannot be produced without them. DGA has approximately 6,000 members.

Each of the talent guilds has industry-wide agreements with the three major television networks, with all the major motion picture and television producers, and with hundreds of other employers of writers, actors and directors in the motion picture and television industry.

Among the principal concerns of the talent guilds are to insure a fair return to creators of and performers in motion pictures and television and to protect economic benefits which have been achieved through collective bargaining in the unique industry which film entertainment is. The pro-

ductive career of many employees in that industry is transient and fleeting. Actors flicker on the screen and many are gone from the network shows in a few seasons; the careers of directors experienced in particular genres are built on the shifting sands of trends and ratings; the literary creations of writers are devoured in the annual upheavals of network programming and public taste.

Through collective bargaining, the talent Guilds have provided for compensation to their members for reruns of television films which they have written, directed, or performed in and for additional compensation for the exhibition over television of motion pictures originally produced for theatrical exhibition. Such compensation is generally known as "residuals" and is the means for assuring reward for artistic accomplishment and achievement which is permanently captured in film and can be exploited in the future by the owner of the copyright. The product of the artist, like the words of a novelist, endures beyond publication and a single performance, and residuals constitute his reward for the subsequent exploitation of the film. Residuals have been at the heart of the collective bargaining agreements of the WRITERS GUILD, SAG and DGA since the 1950's, and residuals now constitute, for writers, actors and directors a major source of livelihood.

The talent Guilds believe that the protection of their members' residual payments, and the continued existence of the entertaiment industry, are inextricably tied to the protection of the ownership and copyright of motion pictures and television films. Protection of copyright in motion pictures and television films is essential to continued creativity in our society. The Guilds believe that their experience and knowledge in these fields will provide the Court with a distinctive viewpoint on the protection which should be afforded to films which are broadcast over television and

which are consequently the subject for wholesale, free-ride reproduction by the petitioners' devices. The point of view of the talent Guilds is the point of view of the creative community. It is for the preservation of copyright protection.

ARGUMENT.

Summary of Argument.

Motion pictures and television films are protected by copyright. The Copyright Act permits discrete exceptions to the exclusive rights of the copyright owner; none of those exceptions includes the right of third parties to indiscriminately and completely copy entire copyrighted works by videotaping of the works from telecasts made under restricted licenses. Creative talent in the film entertainment industry has relied upon the protection afforded the owners of the copyright by the Copyright Act and by the decisions of this Court. The rewards and compensation of creative talent, and that of numerous other groups and creators, and the survival of the industry itself, rest on the continuation of that protection. Copyright protection insures the diversity of entertainment and intellectual ferment which is indispensable to this society and has long been enforced by this Court.

I.

MOTION PICTURES AND FILMS ARE PROTECTED BY THE COPYRIGHT ACT.

Motion pictures have been protected by the copyright statutes since the inception of the motion picture industry. The courts found such protection even prior to the Copyright Act of 1903. *Edison v. Lubin*, 122 F. 240, 242 (3rd Cir. 1903) *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 F. 262, 266 (C.C.D.N.J. 1905).

The 1912 Townsend Amendment to the Copyright Act of 1909 made the protection expressly a matter of statute.[1]

---

[1]Act of August 24, 1912, ch. 356, 37 Stat. 488, formerly 17 U.S.C. §5 (l) and (m).

The 1976 Copyright Act provides copyright protection to motion pictures under a comprehensive and explicit statutory system. See, e.g., 17 U.S.C. §§101, 106-118, 201.

II.

THE UNAUTHORIZED AND COMPLETE COPYING OF A COPYRIGHTED WORK, ESPECIALLY IN A FORM WHICH IS DESIGNED FOR REBROADCASTING OF THE WORK, IS AN INFRINGEMENT OF THE COPYRIGHT.

Section 106 of the Copyright Act gives the owner of the copyright the exclusive right to reproduce the work, and the exclusive rights to publicly perform and display it. In the case now sought to be reviewed, defendants-petitioners have mounted a frontal attack on these historical rights. The Copyright Act contains no exceptions to the owner's rights which would permit the wholesale copying which the Court of Appeal here has properly held to be a copyright infringement. The exceptions to the owner's rights are limited and are precisely spelled out in Sections 107 to 118 of the Act. None of these exceptions permits videotaping of motion pictures and television programs by Betamax or similar devices, whether in the home or elsewhere.

Petitioners attempt to ride on the shoulders of the fair use exception. 17 U.S.C. 107. But the fair use doctrine is simply not applicable; it has never been extended to the complete and wholesale copying of a work, especially copying in a form which permits subsequent performance and display of the work. See *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937) ("Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use."); and discussion in *Meeropol v. Nizer*, 560 F.2d 1061, 1068-71 (2d Cir. 1977), cert. den. 434 U.S. 1013. Defendants are not free "to film and broadcast a copyrighted

dramatic work without liability to the copyright owner." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977).

None of the requirements of the fair use doctrine as established by 17 U.S.C. 107 can be met by this case. The purpose of reproduction for subsequent home or other use of dramatic or comedic motion pictures or television programs is wholly different from the purposes permitted and nurtured by the statute. Those purposes the statute carefully delineates to be "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," not entertainment. The four factors enumerated in the statute to be considered by the court also all have a cutting edge against permitting the complete copying of motion pictures and television programs.[2]

---

[2]17 U.S.C. 107 reads in full as follows:

> "Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

Amici understand that the parties have briefed the scope of these factors and amici therefore do not elaborate on them in this brief.

III.

PUBLIC WELFARE IS ADVANCED BY COPYRIGHT PROTECTION.

Constitutional and legislative purposes combine to require copyright protection in this case. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-577 (1977), this Court stated:

> Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; for the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court. As the Court stated in Mazer v. Stein, 347 US 201, 219, 98 L.Ed. 630, 74 S. Ct. 460 (1954):
>
> > 'The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.'
>
> These laws perhaps regard the 'reward to the owner [as] a secondary consideration,' United States v. Paramount Pictures, 334 US 131, 158, 92 L Ed 1260, 68 S Ct 915 (1948), but they were 'intended definitely to grant valuable, enforceable rights' in order to afford greater encouragement to the production of works of benefit to the public. Washingtonian Publishing Co. v. Pearson, 306 US 30, 36, 83 L Ed 470, 59 S Ct 397 (1939). The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the

> entertainer's incentive in order to encourage the production of this type of work. [citations]

The drafters of the Copyright Act of 1976 stated a similar principle to be applied to "isolated . . . infringements". In S.R. Rep. No. 94-473, 94th Cong. 1st Sess., at p. 65 (1965), the Senate Committee stated:

> "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright which must be prevented."

Mass infringement by Betamax copying of motion pictures and television programs threatens the industry and all creative personnel in it. The actors, the directors, the writers of such films as "On Golden Pond," "Raiders of the Lost Ark," and "Arthur", to mention but three diverse current films, are entitled to remuneration for their creative efforts. Their contracts with the producer-owners of the copyrights in those films secure such remuneration. Their remuneration is based upon the owner's exploitation of the copyright; indeed, by virtue of the talent guilds' collective bargaining agreements, the creative talent employed by the producer shares in the licensing fees derived from subsequent television exhibition of the copyrighted films. Such provisions have been included in each of the talent guilds' collective bargaining agreements for approximately 30 years. More recently, talent is entitled to a percentage of receipts from the sale of discs and cassettes of the films.[3] These provisions

---

[3]Writers Guild of America — AMPTP Agreements of 1977 and 1981, Articles 13, 15, 51.

Directors Guild of America — AMPTP Agreements of 1978 and 1981, Articles 18 and 20.

Screen Actors Guild 1977 and 1980 Basic and Television Agreement (Part V, Sec. 3B, 1980).

In the case of writers who have contributed to the literary material for a motion picture or television film, only those writers who received credit on the screen (a matter also regulated by the collective bargaining agreement) receive residuals. Similarly, only the director who receives credit for directing the motion picture or television film receives residuals and, of course, only actors who have appeared in the motion picture or television film share in residuals based thereon.

of the collective bargaining agreements rest upon the continuation of copyright protection of the films.

Motion picture and television films record and preserve the artistic creations of writers, directors and actors, not merely the physical productions of the motion picture and television producers. Copyright protection enables all of the talent which combine in the creation and making of motion pictures and television films to receive a just reward for their creativity. The provisions of the collective bargaining agreements are direct reflections of the societal judgment that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' " *Zacchini, supra,* 433 U.S. at 576.

Conclusion.

The doctrine of fair use is not a free ticket to wholesale copying and reshowing of complete motion pictures. The inability of our society to police millions of establishments and homes supports the conclusion that compensation for mass copyright infringement is appropriately to be imposed on the manufacturers and retailers of infringing devices. A proper regard for the rights of creators and copyright owners requires no less. The Petition for Certiorari should be denied

and the case permitted to be properly determined by the trial court.

Respectfully submitted,

PAUL P. SELVIN
SELVIN AND WEINER
A Professional Corporation
By PAUL P. SELVIN
Attorneys for Writers Guild of America, West, Inc.

JEROME B. LURIE
COHN, GLICKSTEIN, LURIE, OSTRIN, LUBELL & LUBELL
Attorneys for Writers Guild of America, East, Inc.

PAUL S. BERGER
BERGER, KAHN, SHAFTON & MOSS
Attorneys for Screen Actors Guild

ELLIOTT L. WILLIAMS
Attorney for Directors Guild of America, Inc.

Petitioner's Brief

No. 81-1687

IN THE

Supreme Court of the United States

October Term, 1982

Office - Supreme Court, U.S.
FILED
AUG 27 1982
ALEXANDER L. STEVAS,
CLERK

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

DEAN C. DUNLAVEY,
(Counsel of Record),
DONALD E. SLOAN,
GIBSON, DUNN & CRUTCHER,
515 South Flower Street,
Los Angeles, Calif. 90071,
(213) 488-7000,
Attorneys for Petitioners Sony Corporation of America, et al.

Of Counsel:
MARSHALL RUTTER,
RUTTER, EBBERT & O'SULLIVAN,
Suite 2200,
1900 Avenue of the Stars,
Los Angeles, Calif. 90067,
(213) 879-9494.

August 28, 1982.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

QUESTIONS PRESENTED.

1. Is reception at home by videotape recorder (followed only by private viewing at home) of free off-the-air television programming an infringement of statutory copyright on such programming?

2. If the answer to Question No. 1 is "Yes", does the manufacture, sale and/or advertisement of a home videotape recorder *per se* constitute contributory infringement whenever that videotape recorder is used for such reception at home?

3. Is "fair use" of a copyrighted work (17 U.S.C. § 107) limited to a "productive use", and precluded from being an "intrinsic use"?

4. Can a federal court impose a compulsory license on a copyright owner, and impose continuing royalties on an infringer, as a remedy for statutory copyright infringement?

5. By totally ignoring the findings of fact of the district court, and by holding retailers liable for contributory infringement when they never were alleged to have such liability, did the Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

The parties to the proceedings below are UNIVERSAL CITY STUDIOS, INC., a corporation ("Universal"), and WALT DISNEY PRODUCTIONS, a corporation ("Disney"), Respondents herein, Plaintiffs-Appellants below, v. SONY CORPORATION OF AMERICA, a corporation ("Sonam") — distributor in America of a home videotape recorder called Betamax, SONY CORPORATION, a corporation ("Sony") — manufacturer of Betamax; CARTER HAWLEY HALE STORES, INC., a corporation, ASSOCIATED DRY GOODS CORPORATION, a corporation, FEDERATED DEPARTMENT STORES, INC., a corporation, HENRY'S CAMERA CORPORATION, a corporation — retailers of Betamax; DOYLE DANE BERNBACH, INC., a corporation ("DDBI") — Sonam's former national advertising agency for Betamax; and WILLIAM GRIFFITHS, an individual; Petitioners herein (except Griffiths, who has no interest in the outcome of this petition or this case), Defendants-Appellees below.

A listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of each corporate petitioner has been included in the Petition; it currently is still accurate (Sup. Ct. Rule 28.1).

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No. 81-1687

IN THE

Supreme Court of the United States

October Term, 1982

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW

The Opinion of the Court of Appeals rendered October 19, 1981 is reported at 659 F.2d 963 (9th Cir. 1981) — Appendix A to the Petition for Writ of Certiorari (cited herein as "Pet. App. 1 et seq."). The Opinion of the United States District Court for the Central District of California entered October 2, 1979 is reported at 480 F. Supp. 429 (C.D. Cal. 1979) — Appendix B to the Petition (cited herein as "Pet. App. 31 et seq.").

JURISDICTION

The Judgment of the Court of Appeals was entered on October 19, 1981. A Petition for Rehearing with a Suggestion for Rehearing in Banc was timely filed on November 2, 1981 and was denied by order dated January 12, 1982 — Appendix C to the Petition (Pet. App. 118). The Petition for Writ of Certiorari was filed on March 12, 1982 and was granted on June 14, 1982. The jurisdiction of this Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Article I, § 8, Cl. 8 of the United States Constitution and several sections of the Copyright Act of 1909 (the "1909 Act") and of the Copyright Revision Act of 1976 (the "1976 Act" — effective January 1, 1978),[1] respectively, each of which is printed in full in Appendix D to the Petition (Pet App. 119 et seq.). The pertinent sections of the 1976 Act are 17 U.S.C. §§ 101 (portions), 106, 107, 411, 501, 502(a) and 504. The pertinent section of the 1909 Act is former 17 U.S.C. § 1 (portions).

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[1]Under Trans. & Suppl. § 112, "All causes of action that arose under title 17 before January 1, 1978, shall be governed by title 17 as it existed when the cause of action arose."

STATEMENT OF THE CASE[2]

This is an action for alleged infringement of statutory copyright — alleged to have occurred under Section 1(a) and (c) of the 1909 Act, and under Section 106(1) of the 1976 Act, by virtue of the *tape recording* made when (1) a home videotape recorder was used (2) to receive a free off-the-air television broadcast of a copyrighted work owned by a respondent (3) for the purpose of home play-back and viewing. No infringement exists by virtue of home play-back and viewing of such a recording (17 U.S.C. § 106(4)). Jurisdiction of the district court was invoked under 28 U.S.C. § 1338(a).

The basic issues in the case are (1) whether such a tape recording is a non-infringing "fair use", and (2) whether the mere supply of a VTR *per se* constitutes contributory infringement if such a tape recording constitutes direct infringement.

The home videotape recorder ("VTR" — sometimes called a videocassette recorder or "VCR") and the household TV set are similar in that both *receive* free off-the-air television broadcasting. They are different in that the household TV set receives the broadcast electromagnetic signals by converting them into sights and sounds simultaneously with the reception; in contrast, the home VTR receives these

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[2]The district court's opinion constituted its findings of fact (Pet. App. 35; Rule 52(a), Fed. R. Civ. P.). The Statement of the Case is based on these findings, which should be accepted as true on certiorari (*United States v. United States Gypsum Co.*, 333 U.S. 364, 394-5 (1948)).

The Court of Appeals did not even mention any finding, let alone suggest it was "clearly erroneous" or disturb it (nor did respondents Universal or Disney, collectively "U/D", ask it to do so); instead, the Court of Appeals substituted *ipse dixit* statements of fact, based on assumptions or treatise references and contrary to the district court's findings of fact, and thereby laid part of the foundation for Question Presented No. 5 (see Petition, pp. 26-28; *Inwood Labs. v. Ives Labs.*, 50 U.S.L.W. 4592, 4595-6 (1982)). See ns. 31, 53 and 55, *infra*.

signals by recording the video and audio components thereof on tape for play-back through the TV set, and thereby for viewing and listening, at a later time.[3] Home use off-the-air videotape recording has been going on continuously in the United States since 1965 using home VTRs made by Sony and others[4] (Pet. App. 40, 43-44; R. 564, 575-6, 636,

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[3]The integrated home VTRs in issue, such as Betamax, consist of three components — a tuner, a video tape recorder, and an RF adaptor. The tuner separates out the video and audio signals from the carrier RF signal (VHF, channels 2-13; UHF, channels 14-83) transmitted by the television station — "tuners have been marketed long before videotape machines have been around" (R. 914). The video tape recorder (by definition) (1) records these video and audio signals on magnetic tape, and (2) regenerates and plays back those same video and audio signals from the tape. The RF adaptor reincorporates the regenerated video and audio signals back into the same kind of RF signal which was transmitted by the television station and which is needed by the TV set. All three components long have been made and sold as separate devices, for various usages, by Sony and others (Pet. App. 33, 39-40; R. 564, 581-2, 590, 639, 647, 677-8, 722-3, 734-5, 750-1, 760-1, 913-4).

In fact, the regenerated video and audio signals from the recorder component of the VTR can be turned directly into the sights and sounds of the program by use of a "monitor".

Home VTRs, including Betamax, have various manual control buttons, including a "pause control" and a "fast forward". The pause control is a commonplace tape recorder (audio or video) control used to interrupt momentarily the machine's function without having to turn it off, whether it is recording or playing back — for example, to prevent recording of something that is not desired, or to stop the play-back while the user momentarily leaves the recorder (Pet. App. 41; R. 698-9, 763-5, 1962-3). The fast forward is another commonplace tape recorder control used to reach a position within the body of the tape at a faster rate than simply by playing back everything that comes before it (Pet. App. 41; R. 765-7).

Unless the user interferes, Betamax records the program exactly as broadcast.

All home VTRs use reusable tape — that is, new programs can be recorded over old programs already on the tape, the old programs thereby being erased (R. 728-9, 746-7, 759, 1867).

[4]There were statements physically affixed to home VTRs for some years after their introduction by Sony in 1965 to the effect that recording of copyrighted material might constitute infringement or should be avoided; Betamax operating instructions always have stated "CAUTION Television programs, films, video tapes and other materials may be copyrighted. Unauthorized recording of such material may be contrary to the provisions of the copyright laws." (Pet. App. 42; R. 711;

(footnote continued on following page)

638-40, 670, 677-8, 738-40, 745-54, 756, 782-3, 790-2, 862-4, 955, 1567, 1668, 1684-5, 1791, 2061).

Free off-the-air television is broadcast by at least 986 stations (another 1000-1500 low power "neighborhood" stations are coming) for the purpose of furthering "the public interest, convenience, and necessity" (47 U.S.C. §§ 153(b), 307(a), 309(a)); the public receives it lawfully because it "is broadcast . . . for the use of the general public . . ." (47 U.S.C. §§ 153(o), 605). There are 727 commercial television stations (supported by advertising), and 259 public/educational television stations (supported by individual and governmental contributions), in the United States (Pet. App. 50-54, 79-80).

The fact (shown hereinafter) perhaps most crucial to the ultimate practical resolution of this case is that there is a wealth of television material broadcast by these 986 stations which is free for unchallenged home use videotape recording — including (a) programming which is registered for copyright by owners who do not object to home use recording, (b) programming which could be registered for copyright but which is not, and (c) programming which cannot be copyrighted — and all of which programming actually is recorded for home use. *The amount of programming available for unchallenged home recording far exceeds that which is challenged.*

"Time shift" is home recording for the purpose of home viewing of the broadcast soon thereafter, following which

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PX [plaintiffs' exhibit] 94 - R. 713); and similar statements have appeared in some ads (*e.g.*, PX 149 - R. 670-1). Such statements have cautioned the consumer about the differences in opinion as to whether *some* off-the-air VTR home recording constitutes copyright infringement. When Betamax was introduced, petitioners' opinion was that no such recording was infringement (Pet. App. 94; R. 1997, 2714); even if it were, petitioners could not have known (Pet. App. 96).

the tape is erased in the course of recording something else — it is the primary kind of home recording at issue herein[5] (Pet. App. 47-8, 107-112). As shown by surveys, it is the predominant use of home VTRs. Time shift enables members of the public to view programs which they otherwise would miss — *e.g.*, workers on a "night shift" now can view "prime time" TV the next day[6] (Pet. App. 82, 108). The VTR thus provides the "societal benefit" of furthering the "public interest, convenience, and necessity".

A secondary kind of home recording, viz., "librarying", is retention of the recording for the purpose of repeat home viewing (Pet. App. 107, 112). There was no evidence of any librarying of any work of respondents, who could have probed the subject but elected not to do so. Moreover, the kinds of movies and other works in libraries (*e.g.*, entertainment, documentary, home movies, pre-recorded, etc.) were not delineated, nor was the length of time a recording needed to be retained in order to qualify as librarying or the number of repeat viewings. Even in generalities, "it has not been proven that many persons will 'library' to any significant extent" (Pet. App. 112). The expense of tying-up tape in a library, and the availability of unedited and superior quality pre-recorded cassettes for rental or sale, all led the district court to downplay librarying of any kind of pro-

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[5]VTR usages other than for home recording — *e.g.*, for swapping tapes, duplicating tapes, recording off cable TV or pay TV, play-back outside the home, etc. — present other differing and interesting legal questions (theoretical or actual), but they are not this case (Pet. App. 34, 55-6, 81-2, 115). No evidence of such activities was before the court.

[6]Any contention that the home VTR owner does not see the program at exactly the day or time intended by U/D is negated by the fact that U/D could not pick the day or time of the telecast anyhow — that prerogative belongs to each individual television station (*Albuquerque Broadcasting Company v. Regents of N.M. College*, 70 F. Supp. 198 (D.N.M. 1945), aff'd 158 F.2d 900 (10th Cir. 1947)).

gramming and to reject respondents' "fear" of damage therefrom.

The district court felt that survey evidence of Betamax usage in general would be of interest to the appellate courts (R. B 89-90, B 129-31). Accordingly, Sonam provided Universal and Disney (collectively "U/D") with a list of 17,000 Betamax owners — a list from which the Field Research survey (PX 730 — R. 1120) was made for U/D and the Crossley survey (DX [defendants' exhibit] OT — R. 2308-9) was made for petitioners.[7]

First and foremost, both surveys showed that Betamax is being used primarily for time shift.[8]

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[7]Neither survey showed any recording of any U/D motion picture.

[8](a) 55% of the owners used it mostly for time shift and another 21% used it half of the time for that purpose (Pet. App. 47-8; PX 730, Question 9; R. 1102-3, 1150);

(b) 96% of the owners used Betamax to record programs they otherwise would have missed (Pet. App. 48; R. 2323; DX OT, Table 1);

(c) 82% of all recordings are played back soon after being made (DX OT, Table 88);

(d) 90% of Betamax owners viewed most play-backs just within the family (Pet. App. 48; R. 2334; DX OT, Table 55); only 9% of Betamax recordings are viewed by more than two persons in addition to the Betamax owner, less than 1% are viewed by more than five such persons (DX OT, Tables 49, 59);

(e) 70% of recorded programs were watched only once or not at all before being erased by another recording (DX OT, Tables 25, 26);

(f) A March 15, 1980 post-trial report prepared for the Corporation for Public Broadcasting showed home recording from Public Broadcasting Service ("PBS") educational stations was highest during fringe-time periods (the three hours before prime time) when *MacNeil/Lehrer, Washington Week, Wall Street Week*, etc. were broadcast. At least 68% of PBS recordings are played back within two days. (Respondents' programming does not appear on PBS.)

(g) A "Home Video" post-trial study prepared for the FCC dated 1 November 1979 synopsized "five major studies of VCR use", finding "it is clear that the principal use of the VCR to date is for time-shift viewing". Also, "Because rating services are prepared to report such time-shifting, broadcasters should actually be helped by this consumer convenience. An audience that was previously unavailable to them is now viewing, and the viewing is properly attributed in audience reports. . . . Most [play-back] occurs relatively quickly after the recording (almost all within a week). Most of such recordings are viewed only once (usually only by members of that household). . . ." (pp. 61-62).

The Crossley survey showed that 49% of Betamax owners record professional baseball, football and/or hockey games (R. 2328; DX OT, Table 4). Major League Baseball (R. 2436-7, 2442-8), the National Football League (R. 2481-7), the National Basketball Association (R. 2511-16), the National Hockey League (R. 2531-34), and the National Collegiate Athletic Association (R. 2540-52) each testified it had no objection to home use videotape recording of its copyrighted broadcasts.

The Crossley survey showed that 10% of Betamax owners record religious programs (R. 2328; DX OT, Table 4). National Religious Broadcasters (25 of whose members own religious television stations — R. 2564-76) and Faith Center (with religious television stations in Los Angeles, San Francisco and Hartford — R. 2577-87) each testified it had no objection to home use videotape recording of its copyrighted broadcasts.

The Crossley survey showed that 63% of Betamax owners record educational programs (R. 2329; DX OT, Table 4-1). The Bureau of Mass Communications of the New York State Education Department (with nine educational television stations reaching 92% of the population of New York State — R. 2593-2606, 2615-6; DX PD, PE — R. 2606), the Center for Library Media and Telecommunications of the Board of Education of the City of New York (channel 25 in New York — R. 2623-40; DX PF — R. 2640), the New Jersey Public Broadcasting Authority (with four educational television stations reaching 85% of the population of New Jersey — R. 2823-44; DX PG — R. 2844) and the Los Angeles City School Board of Education (channel 58 in Los Angeles — R. 2863-2902; DX PI — R. 2902) each testified it had no objection to home use videotape recording of its copyrighted material and its broadcasts. Respondent Universal even agreed expressly to recent "voluntary guide-

lines'' outlining still additional areas of available educational off-the-air programming[9] (127 Cong. Rec. No. 145, E4751, daily ed. October 14, 1981).

The Crossley survey showed that 42% of Betamax owners recorded programs of the National Broadcasting Company (R. 2329; DX OT, Table 4-1). NBC is a wholly-owned subsidiary of RCA (R. 2980, 3008) and RCA sells its own brand of home VTR called SelectaVision (R. 2978-80). NBC owns the copyrights in many programs it broadcasts (R. 2984-3004; DX PM — R. 2986). An NBC corporate planning staff made a study and reported in 1967 that the impact of home VTRs on commercial television broadcasting would be minuscule. In May 1978 the same NBC planning staff made an up-dated report which had no substantial variance as to home VTRs from the 1967 report. NBC believes that home video recording will expand television viewing rather than subtract from it, that such additional viewing will be measured, and that home VTRs will not significantly detract from television's mass audience. NBC believes there is no reason why it and the home VTR industry cannot grow and prosper alongside of each other[10] (R. 3007-18; DX PH — R. 3016-7).

Examples of entertainment-type programming available for home use Betamax recording with the owner's blessing included *Mr. Rogers' Neighborhood*, a television series produced for families with pre-school children and having a daily audience exceeding three million families (R. 2912-

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[9]Moreover, the 1976 Act expressly authorizes various VTR off-the-air recording — *e.g.*, by educators and libraries (17 U.S.C. §§ 108(h), 118(d)(3)).

[10]The American Broadcasting Company recently announced it was inaugurating *Home View Network* broadcasts over its owned and affiliated stations from 2 a.m. to 6 a.m. — especially intended to be recorded at home, for play-back and viewing at the viewer's convenience. *The Washington Post*, April 30, 1982.

23; DX PK — R. 2923), and a television series entitled *Spider Man* — based on the comic strip character (R. 2929-39). There also are entertainment motion pictures broadcast on television as to which the copyright has expired, for example, the motion picture of Universal entitled *My Man Godfrey* (R. 2300-1).

In view of the facts (1) that any television program which is transmitted from tape, or which is taped while being transmitted live, *can be* registered for statutory copyright (17 U.S.C. §§ 101-2, 302(a), 408), (2) that any program which *can be* registered for statutory copyright *cannot be* the subject of any other kind of protection (17 U.S.C. § 301) and (3) that no action for infringement can be brought under the 1976 Act without prior registration and deposit of the tape (17 U.S.C. § 411), petitioners engaged Trendex, Incorporated to make a survey of the copyright practices of television stations (commercial, public/educational, and cable) concerning their self-produced (taped) local programming — DX OV — R. 2767-8. The results showed substantial local programming (including news, documentaries and public events — kinds of programming recorded by 74% of Betamax owners — R. 2328; DX OT, Table 4; DX OV, question 1; Pet. App. 52) which could have been copyrighted but which never could be the subject of an action for infringement because the tapes of such programming are soon erased and re-used (R. 1740-1; DX OV, question 6), thus making deposit and registration (and any action for infringement) impossible. Such programming is free for home recording.[11]

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[11]Channel 47 in Fresno, California, owned by Disney, is an example of a station that could copyright its local taped programming but that does not — and that does not even object to Betamax recording of its originated programs if play-back occurs during nonbroadcast time (R. 1740-3, 1769).

Based on the aforesaid overwhelming evidence, *inter alia*, the district court made a first set of critical factual findings — that "The videotape recorder, like a[n] [audio] tape recorder, is a staple item of commerce. Its uses are varied"; that the VTR is "used for purposes where no infringement could be alleged (*e.g.*, recording material which is not copyrighted or where permission to record is given)" (Pet. App. 92, 97, 104, 106-7, 114).

Respondents Universal and Disney interject themselves into the aforesaid custom and practice of extensive and legal home VTR recording by licensing their programming to commercial stations, for broadcast at times to be chosen by the stations. U/D desire that each broadcast of their programming be viewed by the maximum possible number of viewers, because U/D believe that larger audiences mean larger license fees (Pet. App. 36-39, 50-54, 110; R. 333, 341, 348, 498-9, 508-9, 997, 1253, 1266-7, 1281, 1309-10, 1441, 1447, 1717). But U/D then disrupt the custom and practice by being the only copyright owners ever to bring an infringement action against home recording (television or radio).

Disney's percentage of total commercial television broadcast time is *de minimis*, consisting of only one hour a week on network and one syndicated series that is out of production and tailing out of exhibition (Pet. App. 38-39; R. 314-5). And Universal's percentage in the Los Angeles market on commercial stations during one week at the time of trial was under 5% (R. 532-3, 549-50). There was no evidence that U/D's works appear on public/educational stations at all.

U/D did not seek to hold anyone liable for *direct* infringement by home recording[12] (see Appendices A, B

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[12]Defendant Griffiths was a Betamax owner, alleged to have infringed by home recording but granted immunity (Pet. App. 43-4; R. A 88, A 158-9). The other home VTR owners in issue (Wielage, Lowe and Soule) were not made defendants.

hereto). U/D sought to hold petitioners Sony, Sonam and DDBI liable for *contributory* infringement re home recording based on nothing more than the manufacture, sale and advertisement of Betamax. U/D sought to hold the four VTR retailers-petitioners liable only as *direct* infringers for demonstration recording they did in their stores.[13]

During a five week trial, U/D introduced evidence of 32 instances[14] of home recording of free off-the-air TV, by four Betamax owners.[15] This was the only evidence of infringement. U/D knew of no other home recording of their works (R. 392-5, 1212) and expressly disclaimed seeking a finding of copyright infringement as to any other motion pictures (R. B 175).

As to these four Betamax owners, Griffiths is a time shifter who had recorded five Universal films (as well as documentaries and news, sport and political programs) and had erased, or intended to erase, all of them; his practice is "to record, to watch and erase and reuse" (Pet App. 43-44; R. 1695-6). Soule is a time shifter who recorded two Universal films and had intended to erase them without viewing at all; normally he watches once and then erases

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[13]Store demonstration recording is not an issue in this certiorari inasmuch as both the district court and the Court of Appeals held it was not infringement (Pet. App. 29, 48-49, 87-9). The four retailers-petitioners entered the Ninth Circuit defending only against *direct* infringement by demonstration recording, and left being held liable as *contributory* infringers for home recording — which laid part of the foundation for Question Presented No. 5 (see Petition, pp. 26-28). (Griffiths' sons bought a Betamax from retailer-petitioner Henry's Camera; none of Wielage, Lowe or Soule got his Betamax from any retailer-petitioner — Pet. App. 94.)

[14]Viz., 18 copyrighted motion pictures of Universal, 14 copyrighted motion pictures of Disney.

[15]Viz., defendant Griffiths, non-defendants Wielage, Lowe and Soule. All instances of recording were prior to the 1976 Act, except for Wielage's recording of one Universal and one Disney motion picture (see n. 1, *supra*).

(Pet. App. 46-47; R. 1596, 1600). Lowe was selected by U/D as an extremist because he publishes a home VTR magazine, but still he is just a time shifter as to the films in issue; he or his son had recorded one Universal film, and six Disney cartoons to watch together after his work and then to erase (Pet. App. 46; R. 1653, 1665-7). Wielage also was selected by U/D as an extremist in that Betamax is his primary hobby and he writes for Lowe's magazine; even so, his recordings are for his own personal use, he watches them alone or with a few friends, and he erases when he is finished (Pet. App. 44-45; R. 837, 866).

Based on the evidence pertaining to these home recordings in issue, the district court made a second set of critical factual findings — "that there was no evidence at trial that any advertisements or other statements by [petitioners] in any way induced or caused to be made any of the copies at issue"; and petitioners "have neither the right nor the ability to control Betamax purchasers' use of the machine in their homes" (Pet. App. 93-4, 96-7, 98; R. 810-11, 866-70, 1567-70, 1576, 1578-79, 1582, 1586, 1593-4, 1616, 1651-3, 1675, 1680-1, 1686, 1696, 1939). Moreover, petitioners did nothing (by way of advertisement or otherwise) that caused any of these Betamax owners to believe that home use off-the-air recording of U/D's works was lawful (Pet. App. 43-7; R. 810-11, 869, 1576, 1586, 1593-4, 1616, 1651-3, 1686; see n. 4, *supra*).

The only damage *alleged* to have been incurred by U/D as a result of home Betamax recording was to the specific 32 motion pictures in issue (J.A. 64, 98, 110; R. A 237-9, B 175). But at trial U/D admitted that actually there had been no damage to date to any of these 32 motion pictures (R. 1284-5, 2241, 2251, 2269, 2281-9, 3260, 3268); in fact, U/D's counsel admitted that petitioners "have proven that [the specific dollar amount lost by virtue of the in-

fringements we have found] has been none" (R. 2269-70). Moreover, U/D offered no evidence of any future detrimental effect to be caused by home recording upon the potential market for, or value of, any of these 32 motion pictures; in fact, petitioners proved that the rating services (*e.g.*, Nielsen, Arbitron) could and would measure Betamax recording and viewing, so that respondents could be fully compensated in the usual manner in the marketplace (Pet. App. 54, 109; R. 2963-4, 2968-9, 2971; DX PH — R. 3016-7).

U/D further admitted at trial that they had suffered no damage *of any kind* to date (not just to the 32 motion pictures in issue but to anything else) because of home Betamax recording (R. 288-94, 542-4, 1055, 1206-7, 1233, 2241, 2281-9). However, over petitioners' continued objection (R. 3212, B 129, B 173-5, B 202, B 205), respondents proceeded to testify about future effects *in the abstract* which they speculated could result to copyrighted works *in the abstract* from home recording *in the abstract* — *e.g.*, that live TV viewing and theater attendance would decrease because people would be spending their time watching Betamax recordings, that librarying would lead to *ad nauseam* viewing of a work and detract from its re-run value,[16] that rentals and sales of films and pre-recorded tapes and discs would suffer.[17] Such speculation involved only hypothetical

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[16]Universal's syndication and re-run expert testified that he knows every television programming buyer in the country, that the subject of Betamax never has come up during license negotiations and that Betamax is not affecting syndication (re-run) fees (R. 1464, 1474-5, 1479, 1493-5) — nor has the subject arisen during network license negotiations (R. 1286).

[17]No witness as to such speculative abstract effects had any knowledge of Betamax usage as revealed by the surveys, and each witness' assumptions were at odds with the survey findings (Pet. App. 76-7; R. 393-5, 510-11, 517, 1021-3, 1268-9, 1347-55, 1474, 1487, 1745).

copyrighted works, and generally entailed an effect on one hypothetical work supposedly to be caused by home recording of another hypothetical work. The district court weighed these speculations against other evidence and rejected them (Pet. App. 107-115).

U/D argue often about "large libraries" of tapes, but there is not one iota of evidence in their Field survey nor in petitioners' Crossley survey that there was so much as a single copyrighted work of either of U/D in anyone's library.[18]

U/D also argue often about "deleting", "skipping" and "regularly avoiding commercials" during recording and play-back. Yet, the surveys downplay this also.[19]

Neither the Field nor Crossley survey touched trading or duplicating of tapes.

Counsel for U/D conceded "we have not proved any actual damage, that is correct" — not even "a penny" (R. 2241, 2251); and also conceded no proof of petitioners' profits (R. 2252, 3260, 3265). This is not a case where proof of damages was difficult, or where the burden of proof as to damages was misplaced or was of any consequence.

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[18]In fact, both surveys downplay librarying of any kind. Twenty-four percent of Betamax owners had no library at all (PX 730, Question 10); 43% had no movies at all in a library (PX 730, Question 10A); and the average number of cassettes in a library with movies on them which the owner expects to keep was less than *four* — with 69% of the owners expecting to keep *none* (PX 730, Question 10B).

[19]Since the pause button was used to avoid recording commercials only 8% of the time (Pet. App. 48; R. 2335; DX OT, Table 16), and since the fast forward was used to skip commercials during play-back of only 25% of the remaining 92% of recordings that contained them (Pet. App. 113; DX OT, Table 38), 69% of playbacks necessarily included commercials. By somewhat different routes, both surveys agreed that over 60% of Betamax play-backs included commercials (see docket entry 91-5/15/79, pp. 11-12). Neither survey (or other evidence) probed how many owners watched commercials during live viewing (R. 1152, 1372-3) or during play-back.

This is a case where the unequivocal absence of damage not only was admitted but also was affirmatively proved.

The district court's third set of critical factual findings made repeated reference to the absence of any harm or damage caused, or to be caused, to either Universal or Disney by home use Betamax recording — *e.g.*, U/D "admitted that no actual harm to their copyrights had occurred to date"; "testimony at trial . . . did not establish even a likelihood of harm"; in fact, the evidence showed that home use recording "does not reduce the market for plaintiffs' works" (Pet. App. 50, 76, 87, 102, 107, 108, 115, 116).

The district court's opinion recognized the "strong competing claims" between the "private motivation" of copyright owners and the public interest in receiving "material broadcast on public airwaves" (Pet. App. 32-3, 67-8); and followed the resolution made by Congress and this Court that "copyright is '[n]ot primarily for the benefit of the author, but primarily for the benefit of the public' " (Pet. App. 68). The district court limited its opinion to " 'home use' recording" of programs "broadcast free to the public over the public airwaves" (Pet. App. 55, 74), and found that such home recording was fair use and not infringement (Pet. App. 56-7, 87, 117) — *e.g.*, such use increased access to information voluntarily broadcast by plaintiffs over public airwaves, consistent with First Amendment policy (Pet. App. 79-80, 82), and did not reduce the market for plaintiffs' works (Pet. App. 87). The district court also noted that legislative history included a House Judiciary Committee Report plus "committee hearings, floor debates and reports from the Office of Copyrights" (Pet. App. 61-2), and that "when the issue was discussed by Congress, all indications were that Congress did not intend to give monopoly power over this use" (Pet. App. 57, 65, 117). Finally, the district court concluded there could have been no

contributory infringement by any petitioner merely in supplying a "staple article of commerce" like Betamax, which is "capable of non-infringing uses . . . where no infringement could be alleged" (Pet. App. 97, 104, 106-7); and petitioners had not otherwise contributed where they had no control over consumers' use of Betamax in the privacy of their homes, they did not induce or cause any recording of U/D's works, they did not believe recording of U/D's works was unlawful and yet they had not led any consumer to believe it was lawful (Pet. App. 92, 93-4, 4[illegible]-7).

The Court of Appeals complimented the district court on its "elaborate, painstaking, and thoughtful opinion" which "carefully outlined the facts" (Pet. App. 3); then ignored those facts totally and reversed with a broadside. As between copyright owner and the public, the Court of Appeals favored the former, saying "it is clear that the real purpose of the copyright scheme is to encourage works of the intellect" (Pet. App. 4). The court held that home recording was precluded from being fair use because "intrinsic use" never could be fair use (Pet. App. 14-18); also, ignoring and overruling the district court's critical findings as to absence of harm, it said "it seems clear that it [home recording] tends to diminish the *potential* market for appellants' works" (Pet. App. 25). The court declined to look for any legislative history as to fair use, and looked only for a home recording exemption "in ways not specified in U.S.C. §§ 107-118" — and found none (Pet. App. 6-7). The court found contributory infringement by again ignoring and overruling the district court's critical findings, saying "videotape recorders are not 'suitable for substantial noninfringing use' " (Pet. App. 25-26) and "there is no doubt that appellees have met the other requirements for contributory infringement — inducing, causing, or materially con-

tributing to the infringing conduct of another"[20] (Pet. App. 27).

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[20]Within weeks after the Court of Appeals issued its opinion, Universal sued 50 other manufacturers, distributors and advertisers engaged in home VTR supply, including RCA, General Electric, Zenith, Sears, Panasonic, Sanyo and Toshiba and representing essentially the entire balance of the home VTR industry — again, in the Central District of California (the "RCA *et al.* case" — No. 81-5723 FW). That case has been stayed by stipulation and order pending this certiorari.

Two weeks after this Court granted certiorari, Universal again sued all petitioners herein, again in the Central District of California (the "Betamax II case" — No. 82-3271 FW). The complaint does not allege even a single instance of known home recording; instead it alleges, on information and belief, that "each" motion picture ever licensed by Universal to network television, local television, pay television and/or cable television has been recorded at home by one unknown Betamax owner or another, and that petitioners are liable therefor.

In each of these new cases, Universal expressly seeks no relief against any VTR user, but seeks an injunction, *inter alia*, as to defendants. Universal's goal is to use such injunctions as leverage in forcing new legislation to impose a "royalty" on VTRs and tape — *e.g.*, Amendment No. 1333 to S. 1758 (the Mathias bill) and H.R. 5705 (the Edwards bill), 97th Cong., 2d Sess.

SUMMARY OF ARGUMENT

Normally, making a "copy" of a copyrighted work is the first step in making some use of the work opposed by the copyright owner. However, in this case, making a "copy" is a necessary and first step in making exactly that use of the work which the copyright owner intended — viz., home reception and viewing of a free off-the air TV broadcast.

The recording made in the course of reception by home VTR of free off-the-air TV programming is not an infringement, but rather is a "fair use", of any such programming which is copyrighted. The public policy underlying free TV broadcasting is that any member of the population who has the "means" of receiving such broadcasts at home has the right to do so, and to view them privately at home, without charge — the recording is merely a mechanical step employed by the VTR "means" of reception. Home VTR recording no more than enhances TV reception by the intended audience.

Legislative history of the 1976 Act literally extends from 1955-1976. Between 1955 and 1971 there was considered review, *inter alia*, of (a) whether unauthorized performance of motion pictures in the privacy of the home should be deemed infringement, and (b) whether sound recordings (viz., phonograph records) were to be given copyright protection against off-the-air home recording. In the course of reviewing and answering these questions ("no" to each), Congress clearly manifested its belief and intent (while passing a "1971 Amendment" to the 1909 Act) that off-the-air home recording from radio or TV was not infringement — viz., that it was fair use. After 1971, and prior to passage of the 1976 Act (which incorporated the 1971 Amendment), there was no further consideration of any of these issues, since they had been resolved.

The home VTR is a staple item of commerce, used for home recording of TV programming whose owners consent (or cannot object) thereto far more often than for home recording of TV programming whose owners do object. It provides a great societal benefit. Moreover, petitioners did not induce or cause any of the home recording in issue; nor did they cause any VTR owner to believe it was legal. Hence, even if home recording of respondents' work were direct infringement, there is no legal basis upon which to hold any petitioner liable for contributory infringement.

There is neither statutory provision nor decisional precedent for judicial imposition of a compulsory license and continuing royalties as a remedy for copyright infringement.

ARGUMENT

I.

HOME VTR RECEPTION OF FREE OFF-THE-AIR TV, FOR HOME VIEWING, IS FAIR USE.

Congress is empowered, but not required, by the Constitution to give copyright protection to authors. Under Article I, § 8, Cl. 8 of the United States Constitution, the constitutional *goal* is "To promote the Progress of Science and useful Arts . . ." and the constitutional *means* is "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". The Constitution, *per se*, confers no copyright rights on anyone. What kinds of works will be protected, and what types of protection any particular kind of work will receive, is limited to what Congress can grant and does grant; in fact, neither the 1909 Act nor the 1976 Act gives any copyright owner exclusive rights as to *all* uses of his work. Also, as a general premise, copyright is "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public"; each copyright Act "must be construed in light of this basis purpose".[21]

Respondents' claim of infringement is no more sophisticated than (a) that home VTR tape recording fits a literal dictionary definition of the copyright owner's exclusive right to "copy" or to make "any transcription or record" under § 1(a), (d) of the 1909 Act (Pet. App. 127) and "to reproduce . . . in copies" under § 106(1) of the 1976 Act (Pet. App. 122-3), and (b) that there is no statutory exception from such exclusive right expressly mentioning home

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[21]H.R. Rep. No. 2222, 60th Cong., 2d Sess. 9 (1909); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Copyright exclusivity may even be limited to precluding others from usage for *commercial purposes* (*Goldstein v. California*, 412 U.S. 546, 555 (1973)).

use videotape recording. (Focusing on the "copy", instead of on how and why it came to be made, is like focusing on the hole instead of on the doughnut.)

However, beginning with *Folsom v. Marsh*, 9 Fed. Cas. 342, No. 4901 (C.C.D. Mass. 1841) and *Lawrence v. Dana*, 15 Fed. Cas. 26, No. 8136 (C.C.D. Mass. 1869), and culminating with *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd. by an equally divided court*, 420 U.S. 376 (1975), the lower federal courts have recognized that literal enforcement of the exclusive rights provided by copyright statutes would not produce a fair result in some cases and therefore devised the doctrine of "fair use" — a doctrine which created a "privilege in other than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner. . . ." *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). Fair use always has been a doctrine without rigid definition. "The line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria." *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). Common sense and fairness spawned the doctrine, and common sense and fairness are still the best criteria in its application.

Fair use never has been adjudicated by this Court.

The 1976 Act did not change fair use. It did, however, codify the doctrine for the first time — in 17 U.S.C. § 107 (Pet. App. 123). In doing so, both the House and the Senate

left a sufficiently clear trail as to the intent of the codification.[22] Section 107 is as follows:

> "Sec. 107. Limitations on Exclusive Rights: Fair Use
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> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes:
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

The 1975 Senate Report termed fair use "one of the most important and well-established limitations on the exclusive right of copyright owners"; "an equitable rule of reason" where "no generally applicable definition is possible, and

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[22] *E.g.*, Senate Report No. 92-72, 92nd Cong., 1st Sess. — the "1971 Senate Report"; House Report No. 92-487, 92nd Cong., 1st Sess. — the "1971 House Report"; Senate Report No. 94-473, 94th Cong., 1st Sess. — the "1975 Senate Report"; House Report No. 94-1476, 94th Cong., 2d Sess. — the "1976 House Report"; Senate-House Conference Committee Report, No. 94-1733, 94th Cong., 2d Sess. — the "Conference Report".

each case raising the question must be decided on its own facts'' (pp. 61-2).

Both the 1975 Senate Report and the 1976 House Report state that there was no intention to ''freeze'' the doctrine, no intent to ''change, narrow, or enlarge it in any way''.[23]

The fact that off-the-air home recording (audio or video) is not one of the express exceptions or limitations as to the copyright owner's exclusive rights under the 1976 Act's sections 108-118 is irrelevant to its being found a fair use — section 107 is independent of, and in addition to, sections 108-118.[24]

Section 107 provides, *inter alia*, that ''reproduction in copies'' can be fair use ''notwithstanding the provisions of section 106''. In testing whether any particular use is a fair use, section 107 sets forth four factors or criteria which ''shall [be] include[d]'' among ''the factors to be consid-

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[23]''The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

''Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.''

1976 House Report, 66; 1975 Senate Report, 62.

[24]*E.g.*, the 1976 House Report states at p. 78:

''Nothing in section 108 impairs the applicability of the fair use doctrine. . . .''

ered''. But none of these four factors is ''definitive or determinative''[25] (1975 Senate Report, 62).

The touchstone in testing for fair use as to the recordings in issue, even before applying these four factors, is an understanding of the extent of the public's right to receive free off-the-air TV. Under the Communications Act of 1934 (47 U.S.C. § 301 *et seq.*), Congress has preempted control over use of the spectrum of electromagnetic frequencies for communication (see *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-4 (1942)). Limited portions of that spectrum have been allocated to free off-the-air radio and to free off-the-air TV. ''Broadcast frequencies are a scarce resource; they must be portioned out among applicants.'' (*Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94, 101 (1973)). ''No one has a First Amendment right to a license or to monopolize a radio frequency. . . .''; broadcasting is a ''privilege'' (*Red Lion Broadcast Co. v. FCC*, 395 U.S. 367, 389, 394 (1969)). Any broadcaster given the privilege of using such frequencies must serve the ''public interest, convenience and necessity'' (47 U.S.C. §§ 307(a), 309(a)).

As this Court has recognized, program owners like Universal and Disney are well paid indirectly by the public for allowing their programs to be ''broadcast . . . for the use of the general public. . . .'' (47 U.S.C. §§ 153(o), 605 — Pet. App. 80; see Appendix C hereto). And U/D's pro-

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[25]The 1975 Senate Report stated (p. 63):

> ''The statements in this report with respect to each of the criteria of fair use are necessarily subject to qualifications, because they must be applied in combination with the circumstances pertaining to other criteria, and because new conditions arising in the future may alter the balance of equities. It is also important to emphasize that the singling out of some instances to discuss in the context of fair use is not intended to indicate that other activities would or would not be beyond fair use.''

gramming, once broadcast, thereby has been "released to the public" (*Fortnightly Corp. v. United Artists*, 392 U.S. 390, 400 (1968); *Teleprompter Corp. v. CBS*, 415 U.S. 394, 410 (1974)). U/D have "no control over the segment of the population which may view the program"; "The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so" (*Teleprompter, supra*, pp. 412, 408). Such consequences of broadcasting manifestly cut across copyright to some extent — U/D cannot eat their cake and have it too; they cannot broadcast and then interfere with reception.

Home VTRs "no more than enhance the viewer's capacity to receive the broadcaster's signal" (as did CATV in *Fortnightly, supra*, p. 399, and *Teleprompter, supra*, p. 401); they do not increase the number of viewers within range of the signal (as did CATV in *Teleprompter, supra*).

The importance of free off-the-air TV to the American way of life, coupled with various pronouncements of this Court over the years, suggest that the public's entitlement today to receive TV for personal use in the privacy of the home approaches, if in fact does not attain, the status of a First Amendment right.[26]

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[26]The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech. . . ." and this Court repeatedly has held that the freedom of speech guaranteed by the First Amendment "necessarily protects the right to receive" communications. *Kleindienst v. Mandel*, 408 U.S. 753, 762-3 (1972); see also *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-7 (1976).

"[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. . . . It is the right of the people to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." (*Red Lion Broadcast Co., supra*, pp. 388, 390).

(footnote continued on following page)

Considering that the recording in issue is only a necessary mechanical step by which the home VTR receives free off-the-air TV broadcasts, such recording should be recognizable immediately as fair use (using nothing more than the "equitable rule of reason" on which fair use was founded). When a copyright owner voluntarily elects to commercially exploit his work by participating in the "privilege" of free off-the-air TV broadcasting, which by definition is "for the use of the general public", his copyright monopoly should not be extended so as to allow him to eliminate or control a "means" (whose reception mechanism entails recording) by which the public receives any and all free television broadcasts. Otherwise, contrary to the intent of the Copyright Clause, the benefit to a few "Authors" would impede free speech and "the Progress of Science" to the detriment of the public.[27] U/D's "privilege" to broadcast must be subordinate to the public's constitutional "right" to receive that (or any other) broadcast; statutory copyright cannot reverse this order of priority. The balancing factor is fair use.[28]

"Since the issue of fair use is one of fact . . . the clearly erroneous standard of review is appropriate." (*MCA v. Wilson*, 677 F.2d 180, 183 (2nd Cir. 1981)). The district court reviewed the specific home recording presented to it, made findings of fact using each of the four statutory "factors", and made an ultimate finding that the home use recording in issue was fair use (Pet. App. 56, 66-87).

As stated in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973), *Stanley v. Georgia*, 394 U.S. 557 (1969) was a reaffirmation that " 'a man's home is his castle.' "

[27]Both "respondents-authors" herein have had substantial interests in a home TV entertainment device called Discovision, which they regard as competitive to the home VTR.

[28]*Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1174 (5th Cir. 1980).

Taking the factors *ad seriatim*, the district court found that the "purpose and character of the use" is to "increase access to the material U/D choose to broadcast", by only the audience U/D intended to view the material (Pet. App. 81-2). "This increase in access" provides the larger audiences which U/D want, and "is consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves" (Pet. App. 82; *Columbia Broadcasting*, *supra*, p. 102).

47 U.S.C. § 303(g) recognizes our country's policy to "generally encourage the larger and more effective use of radio in the public interest" — and "radio" includes television (47 U.S.C. § 153(b); *Allen B. Dumont Laboratories v. Carroll*, 184 F.2d 153, 155 (3rd Cir. 1950)).

In *National Broadcasting Co.*, *supra*, p. 216, Mr. Justice Black wrote:

> "The 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.' § 303(g). The facilities of radio are limited and therefore precious, they cannot be left to wasteful use without detriment to the public interest."

There is no more obvious "wasteful use" of broadcasting facilities than that which occurs when a program is transmitted at a time when those for whom it is intended and who wish to receive it cannot sit in front of their TV sets. Betamax provides a means of helping to reduce that waste.

In *Williams & Wilkins Co.*, *supra*, the Court of Claims held that "intrinsic" use (viz., use of a copy for the same purpose as the original would be used) could be (and was) fair use. The court there was dealing with Xerox reproductions of medical journal articles.

The Solicitor General's brief to the Supreme Court in *Williams & Wilkins Co.*, *supra*, said:

> "[T]he copying of a material for private use may well be outside the scope of the Copyright Act *ab initio*; at least, the fact that the copy is made for personal use and not for commercial benefit is strong support for the conclusion that it is a non-infringing fair use." (p. 26).

In contrast, the Court of Appeals below held that home recording of off-the-air TV was precluded, *per se*, from being fair use because it was "intrinsic use".[29] The Court of Appeals recited that, except for two cases — viz., *Williams & Wilkins Co.* and the district court opinion herein — fair use "has always had to do with the use by a second author of a first author's work." (Pet. App. 14-15, 19); it added, "the fair use doctrine does not sanction home video recording. Without a 'productive use', i.e., when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use." (Pet. App. 18) and "Since the copies made by home videorecording [U/D's motion pictures or anything else] are used for the same purpose as the original, a finding of fair use is not justified" (Pet. App. 23) — viz., no other fair use "factor" need be considered.

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[29]Pet. App. 15. In fact, the premise of the holding literally is erroneous. The "original" is used commercially to gain revenue by licensing; the "copies" are used non-commercially merely to consummate the private home viewing contemplated by such licensing.

The Court of Appeals' rejection of any copying for purposes of "convenience" or "increased access" also was ill-taken (Pet. App. 14). After citing an example where copying for convenience and increased access *would be* fair use (viz., off-the-air recording by a school for delayed viewing in the classroom), the 1975 Senate Report, pp. 65-6, cautioned that not *all* copying for such purposes necessarily would be fair use by making a statement often quoted out-of-context by respondents — viz., "The Committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances, be considered 'fair use' ".

This inflexible holding of the Court of Appeals is completely contrary to the spirit of § 107 — which is not intended to "freeze" fair use to any "exact rules" but rather is to enable adaptation on a "case-by-case basis".

As to the factor of "nature of the copyrighted work" (which encompasses more than just "subject matter" nature — *e.g.*, "out-of-print" nature, 1975 Senate Report, 64), the district court found that the "most important aspect" was that the case involves only works "which plaintiffs voluntarily choose to have telecast over public air waves to individual homes free of charge" (Pet. App. 79-80). U/D voluntarily exploit their works by commingling them with all the other programming on free off-the-air TV — programming whose "subject matter" nature runs the gamut, and 95+ % of which programming has been available for unchallenged home reception by home VTR. U/D have "no control over the segment of the population which may view the program" (*Teleprompter, supra*, p. 412); and they should have no control over "how" the population "receive" the program nor over when they view it.

"[A] court should . . . allow temporary taping for delayed viewing purposes. . . . Temporary copying simply achieves the access the copyright owner wants viewers to have anyway. . . ." (31 Stan. L. Rev. 243, 263, 255 (1979)).

The fact that the works of U/D (and of their supporting *amici curiae*) may be "entertainment" in subject matter nature (which is all the Court of Appeals focused on — Pet. App. 14, 20) is no determinant in generalized testing for fair use re home recording. Many other televised works may inform or educate; all may provoke thought, comment and reaction.

> "The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such line can be drawn at all."

Stanley v. Georgia, supra, p. 566.

The factor of "effect [if any] of the use upon the potential market for or value of the copyrighted work" often has been described as the most important test for fair use. In short, does the use harm the value of the copyrighted work? The details on this issue of the case have not been understood nor accurately portrayed by the Court of Appeals or by any commentator.

Beneath all the trappings and embellishments, this still is a case founded on alleged copyright infringement of 32 works — no more, no less. The district court found that home recording had caused no damage to these to date and did not reduce their market. Even when the evidence proceeded from these 32 works to the abstract, the district court still found no damage to date and no likelihood of future damage (Statement of the Case, *supra*, p. 15).

Arguments of theoretical "mass" recording (*e.g.*, Pet. App. 24-25) overlook that "mass" viewing is exactly the purpose of free TV. The home VTR enables nobody to record the broadcast who was not intended to see it. Any theoretical "mass reproduction" necessarily would be limited to those members of the public to whom U/D's programs were broadcast; and any theoretical "cumulative effect" of home recording could be nothing more than a contribution to the home viewing intended when the program was broadcast.[30]

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[30]Congress has exempted from infringement cable systems which enhance viewing only within the local geographical service area of the broadcast station, because there is no harm to the copyright owner (17 U.S.C. § 111; 1976 House Report, 90); this Court had done similarly in *Fortnightly, supra*; the same reasoning supports Congress' manifested intent that home VTR usage, which does only the same, was fair use (*infra*, part II).

The evidence showed that the increase in viewing would be measured and paid for under existing practice. But even if VTR viewing required some modification in "existing economic arrangements", the copyright law affords no protection against such modification (*Teleprompter, supra*, p. 414 n. 15).

The Court of Appeals totally ignored all the district court's critical and well supported findings as to the absence of damage, substituting therefor several of its recurrent "it seems clear"-type *ipse dixit* statements — *e.g.*, "it seems clear that it [home recording] tends to diminish the *potential* market for appellants' works"[31] (Pet. App. 25).

The factor of "amount and substantiality of the portion used" was recognized by the district court as "inextricably bound with the issue of harm" or "effect" (Pet. App. 82); manifestly, in the normal commercial case, the greater the "amount" used, the greater the likelihood of an "effect". However, in this case, there is no "harm" or "effect' from time shifting. And there is no "amount" of copying which, per se, is determinative of fair use.[32]

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[31]The Court of Appeals acknowledged that the district court's "elaborate, painstaking, and thoughtful opinion . . . carefully outlined the facts" — but then unbelievably said "it would be a complete waste of judicial time and effort and of no benefit to the Bench or bar to here [in the Court of Appeals' opinion] repeat those facts. . . ." (Pet. App. 3).

[32]"It has sometimes been suggested that the copying of an entire copyrighted work, any such work, cannot ever be 'fair use', but this is an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice." *Williams & Wilkins Co., supra*, p. 1353.

Moreover, the brief duration of the VTR recording counterbalances its "amount and substantiality".

II.

LEGISLATIVE HISTORY CONFIRMS HOME RECORDING TO BE A "FAIR USE" LIMITATION ON THE COPYRIGHT MONOPOLY.

There is an obvious constitutional question as to whether Congress *could* empower U/D to prevent reception of public broadcasts of their copyrighted works with a home VTR. But that question is not reached in this case, because Congress did not consider the 1909 Act to do so, and did not intend the 1976 Act to do so.

Legislative history of the 1976 Act shows that Congress did not intend or regard home use recording to be copyright infringement. The rebuttal to any assertion that Congress did not give "considered review" to a specific or express exemption or limitation (as in §§ 108-118) for home audio or video recording (Pet. App. 11) is that such a review was not necessary — there was no diversity of opinion. By 1971, Congress, the record industry and the movie industry all were well aware of the existence of home audio and video recording and, in the course of considering other related matters, Congress had manifested clearly its belief and intention that all such home recording was *fair use*. All the hallmarks of legislative intent are present — a Committee report, floor debates, statements of a sponsor of the 1976 Act, and interpretations of the Copyright Registers who drafted the 1976 Act.[33]

The District Court examined legislative history of the 1976 Act at length (Pet. App. 56-65). In contrast, the Court

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[33] *Dawson Chemical Co. v. Rohm & Hass Co.*, 448 U.S. 176, 224, 236 (1980), reh. den. 448 U.S. 917 (1980); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 178 (1978); *Simpson v. United States*, 435 U.S. 6, 13 (1978); *Zuber v. Allen*, 396 U.S. 168, 192 (1969); *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964); *Schwegman Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-5 (1951).

of Appeals said that the 1976 Act "is clear and unequivocal on its face" and hence that legislative history "is entirely beside the point" and "is not relevant" — and that resort to it "is entirely unnecessary" (Pet. App. 11-12). The Court of Appeals said that "our concern must be whether Congress has exhibited the intent to limit the rights of copyright owners in ways not specified in §§ 107-118." (Pet. App. 7). But even an abridged review of legislative history shows that Congress regarded and intended home recording, video and audio, to be fair use and thus to be precisely within the exceptions or limitations specified in § 107 — and therefore never made a particular express statutory exception as to either.

Revision of the 1909 Act into the 1976 Act commenced with the Legislative Appropriations Act of 1955;[34] legislative history of the 1976 Act literally spans "the 20 year copyright revision process" (Pet App. 11; just as the 1952 patent law revision legislative history spanned several Congresses — see *Dawson, supra*, pp. 204-12).

In 1961, the Register of Copyrights (Abraham L. Kaminstein) reported to Congress[35] that unauthorized performances of motion pictures in the home should not constitute copyright infringement because, *inter alia:*

> "As a practical matter, unauthorized private performances could rarely be discovered or controlled. . . .";

> * * *

> "New technical devices will probably make it practical in the future to reproduce television motion pictures in the home. We do not believe the private use

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[34]*Fortnightly Corp., supra*, p. 396 n. 17.

[35]Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (1961) — the "Register's 1961 Report".

of such a reproduction can or should be precluded by copyright." (p. 30) (see Appendix D hereto).

In 1965, the Register of Copyrights further reported to Congress about "the imminent development of home video tape recordings."[36]

On June 16, 1965 Adolph Schimel, Vice President and General Counsel of Universal's predecessor in interest, Universal Pictures Co., Inc., and Chairman of the Law Committee of the MPAA (composed of the general counsel for the principal member companies of MPAA), presented to the House Judiciary Committee a statement of the Copyright Committee of the MPAA which showed full awareness of the fact that Sony was about to place a consumer VTR on the market — and which made no assertion that home use recording or playback should be infringement:

> ". . . home video tape recordings are an imminent development. The New York Times for June 9, 1965 confirms that in a few weeks Sony Corporation will be selling for $995 a Videocorder which is a portable home video recorder."[37]

In 1971 the 92nd Congress took a "fragment" (S. 646, previously S. 4592 in the 91st Congress) from the over-all pending copyright revision bill (S. 644), and enacted the fragment into law in October as the "1971 Amendment"

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[36]Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill — the "Register's 1965 Report".

[37]Hearings before Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess., Serial No. 8, Part 2, p. 1033. Another witness at the House Committee hearing was Spencer C. Olin, then a vice president and general attorney of Disney, who stated on behalf of his company:

> "We are fully in accord with and adopt:
> "The statement filed on June 16, 1965, in behalf of the member companies of the Motion Picture Association of America, particularly the statements of Mr. Schimel. . . ."

Id. p. 1545.

to the 1909 Act.[38] The purpose was to give copyright protection against commercial piracy to sound recordings (phonograph records), which theretofore had no copyright protection at all, in advance of passage of the entire revision bill.

Prior to passage of the 1971 Amendment, at a hearing held on the House counterpart "fragment" bill (H.R. 6927) in June 1971, Ms. Barbara A. Ringer, Assistant Register of Copyrights for Examining who became Register of Copyrights in 1971, stated that the 1971 Amendment was not intended to preclude home off-the-air recording.[39]

The witness who followed Ms. Ringer at the same hearing was Stanley M. Gortikov, who appeared on behalf of the Record Industry Association of America, Inc. He differentiated between commercial piracy recording and home

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[38]Sound Recordings Act of 1971, Public Law 92-140, 85 Stat. 391 (see Appendix E hereto).

[39] "MR. (EDWARD) BEISTER (R. Penn.): . . . I can tell you I must have a small pirate in my own home.

"My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set.

"Now, he may retrieve in addition something else onto his recording, but nonetheless, he does retrieve the basic sound, and *this legislation, of course, would not point to his activities, would it*?

"MISS RINGER: *I think the answer is clearly, 'No, it would not.'*

"I have spoken at a couple of seminars on *video cassettes* lately, and this question is usually asked: 'What about the home recorders?'

"The answer i have given and will give again is that this is something you cannot control. You simply cannot control it.

* * *

"*. . . I do not see anybody going into anybody's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping.*" (emphasis added)

Hearings before Subcommittee No. 3 of the House Judiciary Comm., 92nd Cong., 1st Sess. on S. 646 and H.R. 6927, June 9 and 10, 1971, pp. 22-23.

recording, agreeing that home recording could not be and was not intended to be controlled.[40]

The full House Committee on the Judiciary, in the 1971 House Report, made it clear that sound recording copyright owners were not to get any broader protection under the 1971 Amendment than other copyright owners (*i.e.*, motion picture owners) already had under the 1909 Act — viz., the motion picture owners did not have, and the sound recording owners were not getting, the right to restrain home recording for private use.[41]

That the grant of the exclusive right to reproduce was not intended to preclude non-commercial home recording was further shown in an exchange between Representative Kazen

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[40]Gortikov stated: "[T]he pirate also argues that granting a copyright may raise questions about the individual who in his home may duplicate a commercial performance on *home-recording equipment*. We in the industry certainly have known that such amateur practices go on in the home, and *we realistically recognize that no such enforcement is possible, and certainly none is intended*." (emphasis added) *Id*. p. 26.

[41]The 1971 House Report stated:

> "Home Recording.
>
> "In approving the creation of a limited copyright in sound recordings *it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors* under the existing title 17. Specifically, *it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.*" (emphasis added)

1971 House Report, p. 7.

Infringement is the unauthorized use of copyrighted material in a way inconsistent with the "exclusive rights" of the copyright owner as defined by the copyright act (17 U.S.C. § 501(a); *Teleprompter, supra*, p. 398 n. 2; *Fortnightly, supra*, p. 395 n. 10). Since the exclusive rights are a matter of joint intendment by *both* the Senate and the House, the lack of intendment by either legislative body as to any particular right is relevant.

(D. Tex.) and Representative Kastenmeier (D. Wis. — Chairman of the House Judiciary Committee since 1969) on the House floor just a few days prior to passage of the 1971 Amendment.[42]

The 1971 Senate and House Reports and other legislative history of the 1971 Amendment clearly are an integral part of the legislative history of the 1976 Act, as shown by a letter dated January 19, 1971 from the Librarian of Congress to the Chairman of the Senate Judiciary Committee[43] (*Dawson, supra*, p. 204; *Baldridge v. Shapiro*, 50 U.S.L.W. 4227, 4230 n.10 (1982)). The 1971 House Report likewise shows that the 1971 Amendment was intended to become

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[42] "MR. KAZEN. Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?

"MR. KASTENMEIER. Yes.

"MR. KAZEN. *In other words, if your child were to record off a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill*?

"MR. KASTENMEIER: *This is not included in the bill*. I am glad the gentleman raises the point.

"On page 7 of the report, under 'Home Recordings', Members will note that under the bill the same practice which prevails today is called for; namely, *this is considered both presently and under the proposed law to be fair use*. The child does not do this for commercial purposes. This is made clear in the report." (emphasis added)

117 Cong. Rec. 34748-49 (October 4, 1971).

[43] "In general, we also support the amendatory language adopted in *the bill* [S. 4592] which *draws heavily upon the language of the bill for general revision of the copyright law*. . . .

"The most fundamental question raised by the bill is its relationship to the program for general revision of the copyright law. The revision bill before your committee this past session and which Senator McClellan proposes to reintroduce, has parallel provisions, and if general revision were on the threshold of enactment S. 4592 would be unnecessary . . . *Upon enactment of the revision bill, they* [the amendments proposed in S. 4592] *would, of course, be merged into the larger pattern of the revised statute as a whole*." (emphasis added)

1971 Senate Report, pp. 7-8.

a part of what ultimately proved to be the 1976 Act (see Appendix F hereto). And attached to the 1971 House Report was another letter from the Librarian of Congress, this time to the House Judiciary Committee, dated May 25, 1971, stating that the 1971 Amendment would be merged into the ultimate general revision (viz., the 1976 Act — see Appendix G hereto).

Barbara Ringer, as Register of Copyrights, was requested by the House Judiciary Committee to testify at the 1975 hearings on the House general copyright revision bill and to submit the comments of the Copyright Office in writing, which she did.[44]

The Register's 1975 Report states that what Ms. Ringer sought to do for Congress in respect of the bill then pending for the general revision of the copyright law was:

> ". . . to identify what I considered the main issues remaining after a decade of sporadic legislative considerations of the general revision bill. . . ."

Thus, questions which theretofore had been resolved were not the subject of discussion in 1975 when the bill soon to be enacted as the 1976 Act was being considered. Since the matter of the right of the public to reproduce programs off-the-air had been resolved in 1971, there was no reason to discuss it in 1975 — and Ms. Ringer did not do so. It was not one of the main issues remaining. So also, neither the 1976 House Report nor the 1975 Senate Report mentions the subject of the right of the public to reproduce programs off-the-air, because that subject already had been settled.[45]

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[44]Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (1975) — the "Register's 1975 Report".

[45]The Copyright Office's Circular R-99: "Highlights of the New Copyright Law", Aug. 1977, reprinted in Copyright Law Reporter (CCH) ¶ 15,494, recognizes that the 1976 Act incorporates the operative provisions of the 1971 Amendment. It states:

> "The new law retains the provisions added to the present copyright law in 1972, which accords protection against the unauthorized duplication of sound recordings."

The pertinent provisions of the 1976 Act, signed into law October 19, 1976, are virtually identical in substance to the 1971 Amendment.

The legislative history thus shows, beyond question, that Congress, in granting "the exclusive right . . . to reproduce" to copyright owners in the 1971 Amendment and in the 1976 Act, did not intend thereby to bar recordings (audio or video) off-the-air in the home for private use — even though home recording was not among the express exemptions contained in § 1(f) of the 1909 Act or in §§ 108-118 of the 1976 Act. Congress regarded such recording as fair use. As stated by the Court of Appeals, fair use is " 'the most troublesome [doctrine] in the whole law of copyright.' " (Pet. App. 12-13). Since unequivocal aid to the construction of § 107 vis-a-vis home recording is available in the legislative history, such resort should have been made by the Court of Appeals.[46]

III.

THE MANUFACTURE, SALE AND/OR ADVERTISEMENT OF A STAPLE ITEM OF COMMERCE (THE VTR) PER SE SHOULD NOT CONSTITUTE CONTRIBUTORY INFRINGEMENT EVEN IF SOME HOME RECORDING WERE DIRECT COPYRIGHT INFRINGEMENT.[47]

Contributory infringement is the question of the most importance to, and impact upon, the public. This is the question of whether two copyright owners (or even a limited group of copyright owners), who provide a very small portion of free off-the-air TV programming, can prevent home

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[46]*Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 9-10 (1976); *United States v. American Trucking Associations*, 310 U.S. 534, 544 (1940).

[47]If home recording of free off-the-air television is not direct copyright infringement then, of course, there can be no contributory infringement (*Dawson, supra*, p. 216; *Aro Mfg. Co. v. Convertible Top Co.*, 377 U.S. 476, 483 (1963) ("*Aro II*")).

VTR reception of their programming by depriving the entire nation of home VTRs and thereby ending free off-the-air home VTR reception of any and all programming. (An analogous question was answered negatively by this Court in *Aiken, supra*, p. 162.)

If each home VTR owner were held accountable for his own use of the home VTR, then suppliers could continue to make home VTRs available. But if suppliers are held accountable as contributory infringers in lieu of the home VTR owners, over whom they have no control, then the supply of home VTRs (and home VTR reception) will terminate.

The factual findings and uncontradicted evidence crucial to the issue of contributory infringement are that: the home VTR is a staple item of commerce which is used for substantial free off-the-air TV reception where no infringement could be alleged (*e.g.*, recording material which is not copyrighted or where permission to record is given); in fact, the amount of free off-the-air TV programming available for unchallenged home VTR reception far exceeds that which is challenged; no petitioner in any way induced or caused to be made any home VTR recording of any U/D work; no petitioner had the right or the ability to control any purchaser's use of Betamax at home; no petitioner did anything to cause any Betamax owner to believe that home recording of U/D's works was lawful; petitioners warned each Betamax owner of the copyright infringement potential in unauthorized recording, although they believed all off-the-air home VTR recording was lawful and could not have known otherwise. (Statement of the Case, *supra*, 10, 4, 12, 3 n.4).

Another relevant fact, established since the Court of Appeals' decision and since the Petition for Certiorari herein was filed, is that U/D have represented to the public, obviously in consideration of anticipated good will, that no

suit or action ever will be brought against individual Betamax owners for any home VTR recording of U/D's works — a representation that encompasses not only past recordings but all future recordings without limit (see Appendices A, B hereto).

Copyright infringement, like patent infringement, is a tort.[48] A contributory infringer is a species of joint-tortfeaser, who is held liable because he has contributed with another to the causing of a single harm to the plaintiff.[49] The question is — what must that "contribution" be?

One kind of potential "contribution" long recognized in patent law has been supplying the direct infringer of a "combination" patent with an "article" which is comprised of some, but less than all, of the "elements" of that combination — following which, the direct infringer adds the missing "elements" and thereby completes the infringing combination. After years of judicial and legislative consideration of such contribution and its corollaries — as early as *Wallace v. Holmes*, 29 F. Cas. 74 (No. 17, 100) (C.C. Conn. 1871); as recently as 35 U.S.C. § 271(c) (1952) and *Dawson Chemical Co. v. Rohm & Hass Co.*, 448 U.S. 176 (1980) — the patent law today is that the supply of "a staple article or commodity of commerce suitable for substantial non-infringing use" *does not, per se*, constitute contributory infringement when a consumer uses that article or commodity for direct infringement. The definitions of the adjectives "staple" and "substantial" are not precise,[50] but their combined requirements have been satisfied wherever

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[48]*Ted Browne Music Co. v. Fowler*, 290 F. 751, 754 (2nd Cir. 1923); *Thomson-Houston Elec. Co. v. Ohio Brass Co.*, 80 F. 712, 721 (6th Cir. 1897).

[49]*Dawson, supra*, p. 186; *Aro II, supra*, p. 500; *Thomson-Houston Elec. Co., supra*, p. 721.

[50]*Dawson, supra*, p. 186, n.6.

there was any genuine and significant non-infringing use. Wherever the line is drawn, Betamax obviously would be well on the non-infringing side of it. The reason for such a doctrine is self-evident — any other conclusion would extend the patentee's monopoly beyond his patent claims and would "block the wheels of commerce".[51]

An analogous doctrine in copyright contributory infringement was suggested by Justice Holmes in *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62 (1911):[52]

> "The most innocent objects . . . may be used for unlawful purposes. . . .
>
> "In some cases where an ordinary article of commerce is sold nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer. It has been held that mere indifferent supposition or knowledge on the part of the seller that the buyer . . . is contemplating such unlawful use is not enough to connect him [seller] with the possible unlawful consequences. . . ."

In *Kalem Co.*, "no such niceties [were] involved" — the "ordinary article of commerce" was a motion picture which, together with its exhibition, constituted an infringing dramatization of the copyrighted book "Ben Hur". However, no suggestion was made by the parties or the Court that the suppliers of the cameras and blank film, by which

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[51] *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912); overruled on other grounds by *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 518 (1917). Also, if a product is suitable for substantial non-infringing use, its supply *per se* cannot imply any knowledge, intent or inducement on the part of the supplier that the consumer will use it for an infringing purpose (*Rupp & Wittgenfeld v. Elliott*, 131 F. 730, 733 (6th Cir. 1904)).

[52] *Kalem Co.* is the only Supreme Court case to consider the issue of copyright contributory infringement. Resolution of copyright infringement questions by resort to patent infringement analogies is well precedented — *e.g.*, *Sheldon v. Metro-Goldwyn-Mayer Corp.*, 309 U.S. 390 (1939); see 27 Iowa Law Review 250 (1942).

the motion picture was made, should even be contemplated as contributory infringers.

If supplying Betamax, *per se*, were to be held contributory infringement, then the supplier of every camera, typewriter, pen, Xerox machine, etc. used in copyright infringement likewise would be a contributory infringer. Such never has been, and should not now be made, the law.[53]

The other kind of potential "contribution" to copyright infringement obviously can be intentionally causing or inducing it. The Second Circuit has rendered a widely quoted test for such contributory copyright infringement:

> "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."[54]

But even if such a broad test is accepted, the findings and the evidence are that petitioners lacked knowledge (aside from their "indifferent supposition or knowledge" that consumers would be recording TV broadcasts in general) and did not induce, cause or materially contribute.[55] In fact,

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[53]The Court of Appeals said the district court's "reliance on the 'staple article of commerce' theory was inappropriate" (Pet. App. 25-6) — apparently meaning "factually", since no review of the law was made. Again contravening the district court's critical and well supported findings, the Court of Appeals found VTRs "are not 'suitable for substantial noninfringing use' " based on its *ipse dixit*-factual statement that "Virtually all television programming is copyrighted material". This latter erroneous and misleading factual statement ignores the findings and evidence of substantial uncopyrighted programming and copyrighted programming whose owners consent to home recording.

[54]*Gershwin Publishing Corp. v. Columbia Artists Management Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

[55]The Court of Appeals again ran rough-shod over the district court's critical and well supported findings by saying, without explaining, "There is no doubt that [petitioners] have met the other requirements for contributory infringement — inducing, causing, or materially contributing to the infringing conduct of another. The corporate appellees are sufficiently engaged in the enterprise to be held accountable." (Pet. App. 27).

U/D never claimed petitioners made any such contribution — other than U/D's claim that mere supply of the VTR *per se* constituted doing so.

There are a myriad of cases on this kind of contributory copyright infringement, many or most being considered in briefs to the district court,[56] but not one of them is sufficiently in point to warrant citation to this Court — none of them even proposes liability on the supplier of a device used by a direct infringer to accomplish an infringement.

In summary, if the findings and the evidence are to be respected, and if existing law is to be followed, there is no basis whatsoever for holding any petitioner to be a contributory infringer as to any alleged infringement in issue.

Finally, U/D's public representation to Betamax owners that they never will be sued for recording may be a "release" of the public as to past recordings which would not also release petitioners if they were contributory infringers (*Aro II, supra*, pp. 500-2); but that part of U/D's representation which encompasses future recordings is a "future license" to the public as a matter of law, which not only negates direct infringement but also inescapably negates contributory infringement by petitioners, whether U/D so intended or not (*Aro II, supra*, pp. 493-500). By their blatant and crass afforts to curry public favor while they try to shut down the home VTR industry, U/D have hoisted themselves with their own petard. Moreover, equity should not allow U/D to encourage direct infringement by publicly immunizing it, and then to hold petitioners liable therefor as contributory infringers.

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[56]*E.g.*, see docket entries 87-4/17/79, pp. 60-9, and 91-5/15/79, pp. 24-8.

IV.

NEITHER THE 1909 ACT NOR THE 1976 ACT ENABLES A FEDERAL COURT TO IMPOSE A COMPULSORY LICENSE ON A COPYRIGHT OWNER, AND TO IMPOSE CONTINUING ROYALTIES ON AN INFRINGER, AS A REMEDY FOR STATUTORY COPYRIGHT INFRINGEMENT.

An injunction is a discretionary remedy for copyright infringement[57] — a remedy which respondents not only seek in this action but also continue to seek in the RCA *et al.* case and the Betamax II case (see Appendix H hereto). Statutory damages are available under the 1909 Act "in lieu of", and under the 1976 Act "instead of", actual damages and profits;[58] respondents also seek statutory damages in this action (R. 3260).

Apparently sensing that either an injunction or the imposition of statutory damages on manufacturers, distributors, retailers and advertisers would bring the supply of home VTR's to a halt, the Court of Appeals lent its authority to an unsupported suggestion in a treatise and told the district court that "*a judicially created compulsory license*" with a "*reasonable*" and "continuing royalty . . . may very well be an acceptable resolution" (Pet. App. 28-9).

However, there is no statutory provision or decisional precedent for compulsory licensing as a judicial remedy for any copyright infringement. Unlike the Court of Claims in *Williams & Wilkins Co., supra*, p. 1360, the Court of Appeals did not recognize that "Intermediate or compromise solutions are not within our authority". Moreover, no mean-

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[57] § 112 of the 1909 Act, § 502(a) of the 1976 Act; 1976 House Report p. 160; Senate Study on Copyright Law Revision, Committee on the Judiciary Pursuant to S. Res. 240, Studies 22-25, 86th Cong. 2d Sess., p. 127.

[58] §101 (b) of the 1909 Act; § 504 of the 1976 Act.

ingful license could be created between the suppliers of only one brand of home VTR and only two copyright owners; and no federal court in this case has jurisdiction to include anyone else in such a license.

CONCLUSION

First, U/D seek to make this case the first in American legal history to find as copyright infringement either (a) conduct taking place entirely in the privacy of the home or (b) making a copy of anything solely for private personal use.

Second, U/D seek to make this case the first in American legal history to hold a manufacturer, distributor or advertiser of a staple article of commerce strictly "liable for such use" as a contributory infringer when the consumer uses that article in the course of direct infringement — even though these parties did not induce, did not cause, did not and could not control, did not profit from, in no way were associated with, and warned the consumer against the possibility of, the direct infringement.

Third, U/D seek to elevate their profit motivation in commercial exploitation of the public airwaves over and above the public's interest, convenience and necessity in, and right to receive, those airwaves.

Any one such result would be groundbreaking; all three results in one case would be extraordinary and devastating — not just to petitioners herein but to millions of consumers and businessmen across the country.

The case presented by U/D obviously merits no such decision. People are seeing U/D's broadcast programs just as U/D intended and expected they would — nothing more. U/D are not being hurt; to the contrary, they are reaping a financial harvest through exploitation of air waves that be-

long to the public — as well as getting a windfall from pre-recorded VTR cassette rentals and sales.

The facts, the law, and equity all are in petitioners' favor. Petitioners pray the Court to reverse the Court of Appeals' opinion and to adopt the learned and well-reasoned opinion and judgment of the district court: viz., that home VTR reception of free off-the-air TV broadcasts, for home viewing, is not an infringement of respondents' copyrights; but even assuming, arguendo, that respondents' copyrights thereby were infringed, there was no contributory infringement by any petitioner.

Respectfully submitted,

DEAN C. DUNLAVEY,
(Counsel of Record),
DONALD E. SLOAN,
Attorneys for Petitioners
Sony Corporation of America, et al.

Of Counsel:
MARSHALL RUTTER.

August 28, 1982.

APPENDIX A.

". . . in the six years that this case has been pending no suits have been brought against individual VTR owners for VTR copying, and respondents have stated publicly that no such actions will ever be instituted".

Resp. Br. Opp. Cert. p. 6 (circa May 6, 1982)

". . . I believe we have the authority not to proceed against people [VTR owners] who might otherwise be tort feasors of some sort.

* * *

". . . I am the president and the chief operating officer of MCA, Inc., and if I really tell you that we are not going to proceed against any of those three million people [VTR owners], I really think that binds our company."

Sidney Sheinberg — witness before the Senate Committee on the Judiciary re S 1758, Monday, November 30, 1981.

"10. NOTE: [Universal] does not seek relief herein against any homeowners who have purchased videotape recorders and video cassettes and used them only in their own homes to make off-the-air recordings of televised motion pictures for private non-commercial playback in their own homes. [Universal] contends that such recordings constitute infringements of its copyrights in such motion pictures, but [Universal] seeks relief herein with respect to such recordings *only* against the manufacturers, distributors, sellers and advertisers of such videotape recorders and video cassettes."

Complaint, the Betamax II case, filed July 2, 1982.

APPENDIX B.

WALT DISNEY PRODUCTIONS.

DISNE$_{WS}^{Y}$

For Release:
November 2, 1981

In response to numerous inquiries from the news media, Walt Disney Productions' chairman, E. Cardon Walker, issued the following statement related to the recent ruling by the United States Court of Appeals for the Ninth Circuit, on the subject of infringement of copyright laws:

"Walt Disney Productions welcomes and will support appropriate and meaningful legislation to eliminate any liability for individuals videotaping copyrighted television programming for personal use off their home TV sets, as long as safeguards are also provided to prohibit mis-use of creative product.

"Millions of families in the United States and around the world are now involved in videotaping programming in their own homes for their own private use. We have no intention, in this or any other litigation, of pursuing individuals to interfere with this practice.

"We first initiated this case in 1976, more than five years ago, when there were relatively few tape recorders in homes. Since that time we have come to realize that the interests of all concerned can be better accommodated by passage of new laws.

"We feel there is compelling justification for legislation to insure that specific limits be placed on the dissemination and distribution of copyrighted videotape materials beyond use in the home where it was recorded.

"Disney will continue to pursue the current litigation against the Sony Corporation, its distributors, retailers and advertisers, until an acceptable solution can be reached.

APPENDIX C.

". . . holders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material — that is, the television viewers — but by advertisers who use the drawing power of the copyrighted material to promote their goods and services. Such advertisers typically pay the broadcasters a fee for each transmission of an advertisement based on an estimate of the expected number and characteristics of the viewers who will watch the program. While, as members of the general public, the viewers indirectly pay for the privilege of viewing copyrighted material through increased prices for the goods and services of the advertisers, they are not involved in a direct economic relationship with the copyright holders or their licensees.

"By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor. When a broadcaster transmits a program under license from the copyright holder he has no control over the segment of the population which may view the program — the broadcaster cannot beam the program exclusively to the young or to the old, only to women or only to men — but rather he gets paid by advertisers on the basis of all viewers who watch the program. The use of CATV does not significantly alter this situation. Instead of basing advertising fees on the number of viewers within the range of direct transmission plus those who may receive 'local signals' via a CATV system, broadcasters whose reception ranges have been extended by means of 'distant' signal CATV rechannelling will merely have a different and larger viewer market. From the point of view of the broadcasters, such market extension may mark a reallocation of the potential number of viewers each

station may reach, a fact of no direct concern under the Copyright Act. From the point of view of the copyright holders, such market changes will mean that the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the CATV market.

* * *

"While securing compensation to the holders of copyrights was an essential purpose of that Act, freezing existing economic arrangements for doing so was not."

Teleprompter Corp. v. CBS, 415 U.S. 394, 411-13, 414 n. 15 (1974)

"The petitioners have not demonstrated that they cannot receive from a broadcaster adequate royalties based upon the total size of the broadcaster's audience. On the contrary, the respondent points out that generally copyright holders can and do receive royalties in proportion to advertising revenues of licensed broadcasters, and a broadcaster's advertising revenues reflect the total number of its listeners, including those who listen to the broadcasts in public business establishments."

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 163 n. 14 (1975).

APPENDIX D.

The Register's 1961 Report stated (pp. 28-30):

"a. The Present Law.

"The present statute does not provide explicitly for the right to perform (*i.e.*, to exhibit) a copyrighted motion picture. Motion pictures were not mentioned in the act of 1909. By an amendment in 1912, they were added to the classes or works enumerated in section 5, but no corresponding amendment was made in section 1 to provide for the right to perform motion pictures.

"The courts have attempted to fill this gap by applying the terms of section 1 to the performance of motion pictures. In several decisions the courts have held that dramatic motion pictures (photoplays) are a species of dramatic works and are therefore accorded the right of public performance given to dramatic works by section 1(d). The more difficult problem of nondramatic motion pictures was presented to the Second Circuit Court of Appeals in *Patterson v. Century Productions* (93 F.2d 489 (1937)), in which an infringing copy of a documentary (nondramatic) motion picture had been made and exhibited publicly in a theater. The court held that the exhibitor had infringed the copyright, on the ground that the projection of the motion picture on the theater's screen constituted the making of a 'copy' under section 1(a). We believe this last decision is an example of the maxim that 'hard cases make bad law.' In reaching what was no doubt a just result, and apparently seeing no other provision in the statute that would fit the case, the court stretched the concept of 'copying' to new lengths. While that case involved a public exhibition, the theory of 'copying' on which the decision was based, if followed to its logical conclusion, would have a far-reaching effect:

any unauthorized projection of a motion picture, private as well as public, would be an infringement of the copyright. Whether the court would so hold in a case involving a private projection is still a matter of conjecture."

* * *

"d. Private Performances.

"Motion picture producers and distributors have urged that the performance right in motion pictures should extend to what are clearly private performances, including performances given in private homes. They point to *Patterson v. Century Productions*, and its concept that exhibition is a form of 'copying,' to support their position. Motion picture films are commonly leased for exhibition at specified places and dates. Most leases are for commercial exhibitions, but many films are also leased for home use. It is argued that in either case private exhibitions beyond the terms of the lease should constitute an infringement of copyright.

"This argument may have some theoretical plausibility, but we would question it for several reasons:

"Injury to a copyright owner from private performances beyond the terms of a lease would be minimal. He may be entitled to the usual license fee as damages for a breach of contract, but the statutory damages for copyright infringement would be grossly excessive.

"*As a practical matter, unauthorized private performances could rarely be discovered or controlled.*

"Many motion picture films are sold for use in homes, schools, libraries, and the like. The purchaser should not be subjected to the risk of liability for private performances that the copyright owner might contend are not authorized.

"*New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright.*" (emphasis added)

APPENDIX E.

The 1971 Amendment added subsection 5(n), "sound recordings".

The 1971 Amendment also added subsection 1(f), providing that the owner of copyright:

> "shall have the exclusive right:
>
> * * *
>
> "(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: *Provided,* That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided further,* That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use."

The 1971 Amendment further added the following definitions to § 26:

> "For the purposes of this section and sections 10, 11, 13, 14, 21, 101, 106, 109, 209, 215, but not for any other purpose, a reproduction of a work described in subsection 5(n) shall be considered to be a copy thereof. 'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. 'Reproductions of sound recordings' are material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed, and from which

the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and include the 'parts of instruments serving to reproduce mechanically the musical work', 'mechanical reproductions,' and 'interchangeable parts, such as discs or tapes for use in mechanical music-producing machines' referred to in sections 1(e) and 101(e) of this title."

As amended Oct. 15, 1971, Pub. L. 92-140, § 1(e), 85 Stat. 391.

APPENDIX F.

The 1971 House Report (pp. 3-4) said:

"The creation of a limited copyright in sound recordings has been under active consideration by the Congress for a number of years in connection with the program for general revision of the copyright law. The Library of Congress recommended the granting of such copyright protection in its recommendations for the general revision of the copyright law.

* * *

"The Committee regrets that action on the bill for general revision of the copyright law has been delayed, and that the problem of record piracy has not been dealt with as part of a broad reform of the Federal copyright statute. We are persuaded that the problem is an immediate and urgent one, and that legislation to deal with it is needed now. The seriousness of the situation with respect to record piracy, both nationally and internationally, is unique, and our favorable action in this instance should not be interpreted as precedent for the enactment of separate legislation on other matters involved in copyright law revision. On the contrary, we would be opposed to any effort to convert the general revision program into a program for revising the statute on a piecemeal basis."

APPENDIX G.

The May 25, 1971 letter from the Librarian of Congress to the House Judiciary Committee stated, in part:

> "The most fundamental question raised by the bill is its relationship to the program for general revision of the copyright law. As noted above, the revision bill now pending in the Senate has parallel provisions, and if general revision were on the threshold of enactment, S. 646 would be unnecessary. However, some fundamental problems impeding the progress of general revision of the copyright law, notably the issue of cable television, have not yet been resolved. We agree that the national and international problem of record piracy is too urgent to await comprehensive action on copyright law revision, and that the amendments proposed in S. 646 are badly needed now. *Upon enactment of the revision bill they would, of course, be merged into the larger pattern of the revised statute as a whole.*" (emphasis added)

APPENDIX H.

"But, of course, we are not going to be able — the plaintiffs can't go chasing Sony for statutory damages for every copy made of every motion picture of theirs from here until the end of time.

* * *

"And that is really what this case is all about, that is, an injunction."

U/D's counsel of record — R. 70-1

"Certainly at the very least we think that the Court should issue an injunction prohibiting the sale of Betamax. . . ."

U/D's counsel of record — R. 3278

". . . plaintiffs submit that the Court should order defendants to make diligent effort to recall all Betamax VTR's previously sold in order to disable them from further recording."

U/D's Opening Post-Trial Memorandum, p. 71

"WHEREFORE, plaintiff prays for judgment against defendants, and each of them, jointly and severally, as follows:

"1. That an injunction issue against defendants, and each of them, to protect plaintiff's copyrighted motion pictures from recording and copying on the aforesaid VTR's and video-cassettes."

Prayer excerpt, Complaint, the RCA, et al. case, filed November 6, 1981.

"WHEREFORE, plaintiff prays for judgment against defendants, and each of them, jointly and severally, as follows:

"1. That an injunction issue against defendants, and each of them, to protect plaintiff's copyrighted motion pictures from recording and copying on the aforesaid VTR's and video-cassettes."

Prayer excerpt, Complaint, the Betamax II case, filed July 2, 1982.

Respondent's Brief

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No. 81-1687
IN THE

Supreme Court of the United States

October Term, 1982

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS, UNIVERSAL CITY STUDIOS, INC. AND WALT DISNEY PRODUCTIONS.

STEPHEN A. KROFT,
(Counsel of Record),
JOHN G. DAVIES,
SONDRA E. BERCHIN,
9601 Wilshire Boulevard,
Suite 444,
Beverly Hills, Calif. 90210,
(213) 858-7700,
Attorneys for Respondents, Universal City Studios, Inc. and Walt Disney Productions.

Of Counsel:
ROSENFELD, MEYER & SUSMAN.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Counterstatement of Questions Presented.*

1. Whether the fair use doctrine excuses unlimited home videotape recorder copying solely for purposes of entertainment and convenience of entire copyrighted motion pictures.

2. Whether those who manufacture, market and sell videotape recorders intending, expecting and encouraging that they be used primarily to copy entire copyrighted motion pictures are liable for such copying as contributory infringers.

3. Whether this Court should determine the appropriate remedy to be imposed in this case before the district court has had an opportunity to fashion a remedy on remand, and, if so, whether the district court's traditional equitable power to deny an injunction against unauthorized use of property on condition that the defendant pay compensation for such continued use is constricted in this copyright case.

4. Whether reversal of a district court for failing properly to apply settled legal principles violates the clearly erroneous rule of Fed. Rule Civ. Proc. 52(a).

---

*Respondent Universal City Studios, Inc. ("Universal") is a wholly-owned subsidiary of MCA INC. ("MCA"). MCA and/or Universal have the following partially owned subsidiaries and/or affiliates within the meaning of Supr. Ct. Rule 28.1: Two-Beat Music Corp., MCA New Ventures, Inc., Discovision Associates, Saticoy Technology, Inc., Mood Music Company, Inc., Fontaine Music Corp., Roncom Films, Inc., Supreme Music Corporation, Western Costume Co., MPD Leasehold Corp., Afram Films, Inc., American Motion Picture Export Company (Africa), Inc., Motion Picture Export Association of America, Inc., Cinema International Corporation N.V., CIC International B.V., Pincus-Gil Music Pty. Limited, Leeds Music Hans Gerig GmbH & Co. KG, Spoone Music Pty. Limited, Tangerine Music Pty. Limited, Eugene Music Limited, Evita Music Limited, Jeeves Music Limited, Rawlou Music Limited, Spoone Music Limited, Valley Music Limited, Academy Investments No. 1 Pty. Ltd., United Video International N.V., Regent Investments Pty. Limited, Town Cinema Investments Pty. Ltd., United International Pictures B.V., Universal-RKO, Oak

(footnote continued on following page)

Industries Joint Venture, Hotel Two Associates, T.E.M. Programs International, USA Network, Optical Programming Associates, Overland Stage, Inc., Thoremca Productions, Inc. and MCA Foundation, Ltd. Universal and MCA also partially own many companies and/or partnerships formed for the purpose of producing individual motion pictures and/or television programs. These entities are not listed here because of Universal's understanding that they do not fall within the term "affiliates" as used in Rule 28.1.

Respondent Walt Disney Productions' only partially owned subsidiary or affiliate within the meaning of Rule 28.1 is Vista-United Telecommunications, Inc.

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No. 81-1687

IN THE

Supreme Court of the United States

October Term, 1982

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF FOR RESPONDENTS, UNIVERSAL CITY STUDIOS, INC. AND WALT DISNEY PRODUCTIONS.

COUNTERSTATEMENT OF THE CASE.

A. Prefatory Statement.

This is an action by two leading motion picture copyright owners, supported by virtually the entire motion picture industry and many others,[1] to protect their televised motion pictures from unlimited videotape recorder copying ("VTR

[1] In addition to respondents, virtually all other producers and distributors of televised entertainment programs as well as many major producers and distributors of documentary, educational, children's and public television programming have filed objections in this action to home video recording. *See* Brief Amicus Curiae of Creators and Distributors of Programs in Support of Respondents; Clerk's Record ("C.R.") docket sheet p. 18, entry 190 ("18/190"), 19/191-2, 19/208.

copying") without compensation.[2] Respondents simply seek protection against the permanent loss of control over their property and the concomitant erosion of their copyrights that will necessarily result as millions of VTRs are sold and hundreds of millions of unauthorized VTR copies of respondents' works are made.

Notwithstanding this inevitable detrimental impact, petitioners assert that respondents' property rights should be completely disregarded ostensibly for one overriding reason: to ensure that the public is not deprived of a new technological convenience that allegedly increases access to copyrighted material broadcast on television.[3] The premise which underlies this argument, however, is spurious.

Contrary to what petitioners would have this Court believe, to protect respondents' property, the sale of VTRs need not come to a halt. There are several possible remedies that could accommodate the interests of copyright owners, VTR manufacturers and the public, which, ironically, petitioners have eschewed and in fact have sought to suppress.[4]

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[2]These motion pictures are very costly to produce. In 1979 respondents spent between $2,000,000 and $25,000,000 per picture to produce televised feature length motion pictures and between $400,000 and $1,500,000 per episode to produce one hour television series episodes (Reporter's Transcript ("R.") 203, 440, 1167, 1424-25). These costs have increased substantially since 1979.

[3]Behind this assertion — at the heart of the case — is petitioners' desire to reap tremendous profits from the sale of a device whose primary consumer appeal lies in its ability to reproduce copyrighted works without compensation to copyright owners (Appendix to Petition ("P.A.") 19 n. 9; *see* text accompanying notes 114 & 118, *infra*).

[4]For example, an order requiring petitioners to pay respondents a continuing royalty for VTR sales rather than permanently enjoining such sales would accomplish this purpose (P.A. 28-29). So too would an order requiring a technological modification of VTRs which prevents recording of respondents' copyrighted programs (and those of other objecting program owners) but permits recording of all other programs (P.A. 103; R. 3159-71; Appellants' Opening Ninth Circuit Brief 58-59).

Rather than support a continuing royalty, petitioners assert that this Court should prohibit such a remedy (Brief for Petitioners ("P.B.") 45-46). Similarly, after learning of a technological system which would prevent VTR copying of copyrighted programs, Sony immediately stud-

(footnote continued on following page)

Thus, the social benefits that some segments of the public may derive from use of these machines are not necessarily jeopardized by protecting respondents' property rights.[5]

In contrast, if petitioners are permitted to continue their activities without compensating respondents and others similarly situated, public access to television programming, far from increasing, will actually diminish. For, without some mechanism to compensate copyright owners for the unlimited taking and unsupervised use of their creative property, the economic incentive to risk enormous sums to produce high-quality television programming will be substantially undermined.[6] This in turn will result in the production of cheaper, lower-quality television programs and a refusal to license popular, top-quality theatrical motion pictures for

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ied and discovered a method of overcoming this system and objected to introduction of evidence of the system at trial (R. 1781-84, 1802-03, 3159-71; Plaintiffs' Exhibit ("PX") 986-87*).

*Each trial exhibit referred to herein is listed in numerical order in Appendix A hereto. The pages in the record at which each exhibit was identified and admitted are also set forth in the Appendix pursuant to Supr. Ct. Rule 34.5.

[5]Given the expense of VTRs ($875 to $1000 at the time of trial, P.A. 40), not all members of the public can afford to purchase these devices. Thus, the persons most likely to benefit from the use of VTRs are primarily the affluent. *See* PX 730 (Table 19); Defendants' Exhibit ("DX") OT (Table 77).

[6]Statement of David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services 25, 29 (June 24, 1982), *to be reprinted in Hearings on Home Video Legislation before the Subcomm. on Courts, Civil Liberties and Administration of Justice of the House Judiciary Comm.*, 97th Cong., 2d Sess. ___ (1982) ("June 24 House Committee Hearings") ("Register's House Statement"); Statement of David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services 25, 29 (Apr. 21, 1982), *to be reprinted in Hearings on S. 1758 before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. ___ (1982) ("April 21 Senate Committee Hearings") ("Register's Senate Statement"); Statement of Jack Valenti, President, Motion Picture Association of America, Inc. 3 (Apr. 21, 1982), *to be reprinted in* April 21 Senate Committee Hearings ___, 97th Cong., 2d Sess. ___ (1982) ("Valenti Statement"); Statement of Francis S.M. Hodsall, Chairman, National Endowment for the Arts 4-5 (June 24, 1982), *to be reprinted in* June 24 House Committee Hearings ___, 97th Cong., 2d Sess. ___ (1982) ("Hodsall Statement"); Testimony of Sidney Sheinberg, President and Chief Operating Officer of MCA INC. 92-93 (Nov. 30, 1981) (unofficial transcript), *to be reprinted in Hearings on S. 1758 before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. ___ (1981).

exhibition and "free" viewing on commercially sponsored television, thereby prejudicing the entire television viewing public, VTR and non-VTR owners alike.[7]

B. The Parties and the Products at Issue.

Respondents produce, own and license for television exhibition thousands of motion pictures.[8] Petitioners manufacture, advertise and sell VTRs under the brand name Betamax for the primary purpose of making copies of copyrighted television programming, especially copyrighted

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[7]R. 263-67, 1200-01; H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 134 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659 ("1976 House Report") ("[i]n some cases the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights."); Statement of Bruce L. Christensen, President of the National Association of Public Television Stations 1 (Sept. 22, 1982), *to be reprinted in Hearings on Home Video Legislation before the Subcomm. on Courts, Civil Liberties and Administration of Justice of the House Judiciary Comm.*, 97th Cong., 2d Sess. ___ (1982); Valenti Statement, *supra* note 6, at 15-16; Statement of Joan Ganz Cooney, President, Children's Television Workshop 2-3 (Apr. 21, 1982), *to be reprinted in* April 21 Senate Committee Hearings ___, 97th Cong., 2d Sess. ___ (1982); Hodsall Statement, *supra* note 6, at 4-5.

[8](P.A. 37-39). Respondents produce two types of motion pictures, those made initially for theater exhibition ("theatrical motion pictures") and those made for initial television exhibition, including television series episodes. After theater exhibition, most of respondents' theatrical motion pictures are licensed for exhibition on pay television, then on network television and finally on local stations. Respondents' motion pictures made for television are first exhibited on prime time network television, and if successful are re-licensed to the networks and then licensed for exhibition on local stations (P.A. 36-39).

Petitioners also sell and rent to the public copies of many of their motion pictures on pre-recorded video cassettes and video discs which can be viewed on a home television screen with the aid of a video cassette or video disc player. In addition, petitioners rent prints and sell excerpts of their motion pictures to the public (P.A. 36-39; 20 *Television Digest*, No. 27, July 7, 1980, at 13).

Since motion pictures rarely recoup their costs from initial theatrical or network exhibition, the subsequent markets in which those works are exploited — the very markets most seriously threatened by VTR copying — are essential to the continued health of the motion picture industry (P.A. 37, 39); R. 204-05, 250-58, 260-62, 274-77, 323-24, 440-41, 451-55, 539, 991-1002, 1169-70; Valenti Statement, *supra*, note 6, at 11-12.

motion pictures owned by respondents and *amici*.[9] This use is advertised, intended, expected and encouraged by petitioners, and is the source of the VTR's consumer appeal.[10]

VTR owners engage in several types of recording and playback activities. First, the majority collect large libraries of VTR recordings, including recordings of motion pictures owned by respondents, which are saved indefinitely for unlimited repeat viewings (P.A. 43-48). In fact, at the time of trial the average Betamax owner owned approximately 30 Betamax tapes (P.A. 47).[11] Second, Betamax owners time-shift, *i.e.*, they record for later viewing television programs which they do not watch at the time of broadcast.[12]

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[9]P.A. 26, 27; R. 1776-79, 1820-21, 1852-53, 1966, 1968, 2077-80, 2094-95; PX 143, 648-49, 716 (p. 8), 723 (p. 2), 1063, ¶5. Most Betamax models have a built-in television tuner that permits Betamax to record off-the-air. Petitioners also sell some models without built-in tuners that can record off-the-air with a separate outboard tuner and that can make home movies with a video camera (P.A. 40; R. 735-37). In addition, petitioners sell other models which cannot record, but can only play back prerecorded cassettes (PX 552). Respondents do not object to the sale of models without built-in tuners, but do object to the sale without compensation to copyright owners of separate outboard tuners for off-the-air recording of their property.

[10]P.A. 27, 41-42, 96-97; PX 454, 460, 461, 463, 466, 519, 546, (pp. 2-3), 548, 554 (p. 8); *see* note 9, *supra*. Petitioners err in stating that VTRs have been sold for home recording continuously since 1965 (P.B. 3). Indeed, Sony's officers admitted that prior to introducing Betamax in late 1975, all attempts to sell home use VTRs failed (R. 1777, 1789-92, 1840, 2018-19, 2058-61, 2140-41; PX 109-14, 716 (p. 4); Pre-Trial Conference Order, C.R. 22/68, p. 9, ¶¶T, U).

[11]Petitioners' statements that "[t]here was no evidence of any librarying of any work of respondents" and that "this case is only time shift" (P.B. 5; Petition 17) are grossly inaccurate. The district court expressly found pervasive librarying activities, and the uncontroverted survey evidence established that 69% to 75% of all Betamax owners maintain large libraries of off-the-air recordings and that the vast majority of programs in those libraries are copyrighted motion pictures (P.A. 43-48; PX 717 (pp. 0619, 0636, 0637), PX 730 (Tables 6A, 10), DX OS (Tables 4, 6, 7). *See* DX OT (Table 60). If Betamax were merely a "time-shift" machine, consumers would need only a handful of tapes — not 30 — because tapes are eraseable and reusable.

[12]The time-shift concept assumes that Betamax owners voluntarily erase time-shift recordings immediately after they are played back and viewed once (P.A. 111; P.B. 4-5). Subsequent erasure of these recordings does not, however, alter the fact that they — like library recordings — constitute illegal *copies* under the Copyright Act.

Third, because VTR copies do not self-erase, many Betamax owners view time-shift recordings several times before erasure, thereby effectively using these recordings for library purposes.[13] Fourth, Betamax owners regularly delete commercials from their recordings.[14]

Petitioners mislead the Court in stating that over 95% of all television programming is "available for unchallenged home recording" (P.B. 4, 29, 40).[15] Virtually all programs broadcast on television are protected by federal or state law from unconsented VTR copying. (*See* note 110, *infra*). Furthermore, over 80% of the material copied is entertainment programming, the bulk of which is owned by respondents and supporting *amici*, all of whom — along with many educational producers, also *amici* — object to such copying. (*See* notes 112, 114, 116 & accompanying text, *infra*). Moreover, despite the contrary position taken by petitioners in this litigation, they have always believed that home video recording violates the Copyright Act.[16]

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[13]P.A. 111; DX OT (Table 43).

[14]P.A. 48; P.B. 14 n. 19. Deletion of commercials is accomplished with either Betamax' pause control, which petitioners admit is designed primarily to avoid recording commercials, or the fast forward control, which permits Betamax owners to skip over recorded commercials on playback (P.A. 41; R. 822-26, 1779, 1795-96, 1827-29; PX 559 (¶51), 1063 (¶6(b)); *see* P.B. 3 n. 3).

Deleting commercials is a very significant activity. The surveys unanimously show that from 40% to 85% of all VTR recordings are viewed without commercials (PX 717 (pp. 0391, 0515, 0630, 0713), PX 730 (Tables 11, 12), DX OT (Table 38); R. 2390-91; Media Statistics, Inc., *Mediastat: Third Annual Diary of VCR Homes, Fall, 1981*, 8120 Fenton Street, Silver Spring, Maryland.

[15]Petitioners make these statements without any citation to supporting facts or authority and in total disregard of copyright law. (*See* notes 110, 112, 114-16 & accompanying text, *infra*).

[16]*See* note 95, *infra*. Indeed, the advertisements, brochures and operating instructions for VTRs sold by Sony prior to introducing Betamax stated: "THIS VIDEOTAPE RECORDER IS NOT TO BE USED TO RECORD COPYRIGHTED MATERIAL" (R.T. 638-44, 921-24; PX 147-52, 155-70, 228, 252, 253, 326, 328-30, 448-49, 452-53).

C. The Proceedings Below.

Respondents brought this action alleging that VTR copying constitutes copyright infringement and that petitioners are liable for such infringement under the doctrines of contributory infringement, direct infringement, vicarious liability and unfair competition (P.A. 54, 101).[17] Respondents sought equitable and monetary relief, electing prior to trial to recover statutory damages in lieu of actual out of pocket damages or petitioners' profits.[18]

The district court (Ferguson, J.) found for petitioners, holding that VTR copying for private viewing is impliedly excepted from the express statutory prohibition in the 1976 Act against unauthorized copying (P.A. 57-65)[19] and, alternatively, that such copying is permitted by the fair use doctrine (P.A. 66-87). The district court further concluded

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[17]The action was brought pursuant to both the Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075, 17 U.S.C. §§1 *et seq.* (superseded 1978) ("1909 Act") and the General Revision of Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541, 17 U.S.C. §§101 *et seq.* ("1976 Act").

[18]*See* 1909 Act §101(b); 1976 Act §504(c); R. 69-70, 3265-68; C.R. 28/88, pp. 65-66.

Since respondents had the absolute statutory right to make this election (*Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1178-79 (9th Cir. 1977); 17 U.S.C. §504(c); 1976 House Report 162, ¶1), they did not attempt to prove their actual out of pocket damages or petitioners' profits. Petitioners' statement that respondents "admitted at trial that they had suffered no damage *of any kind* to date . . . because of home Betamax recording" (P.B. 13) is incorrect. Due to the small number of Betamax which had been sold by the time of trial (only 130,000 units representing less than ⅕ of 1% of the 73 million television households then in the United States, PX 124, 1068), respondents were unable to measure the amount of harm which they had suffered from unknown VTR copies. Respondents, however, adamantly maintained that such harm had in fact occurred through, among other things, loss of the value of each unauthorized VTR copy and loss of control over access to respondents' copyrighted works. Respondents also vigorously urged that such harm will be extensive in the future (P.A. 76-77; R. 263, 288-94, 394, 513-15, 542-44, 1206-08, 1256-57, 1284-87, 1370-71, 1475, 1493-94, 2281-89).

[19]The district court did not find an implied statutory exemption in the 1909 Act (P.A. 14, 56-57).

that even if VTR copying constitutes infringement, petitioners are not liable for such infringement (P.A. 89-102) and, even if they are liable, respondents are entitled to no relief (P.A. 102-15). The latter two holdings were based primarily on the district court's analogy to the patent statute's staple article of commerce doctrine and the court's conclusion that VTRs are staple articles of commerce capable of *some* non-infringing uses (P.A. 92, 97, 104, 114). Importantly, however, and contrary to petitioners' assertion (P.B. 19, 40), the court refused to find that VTRs are suitable for *substantial* non-infringing uses (P.A. 97, 114).

The Court of Appeals (Kilkenny, J.) unanimously reversed the district court in all respects, ruling that based on the facts found by the district court and petitioners' admissions, the district court's decision was incorrect as a matter of law. The Ninth Circuit first held that under the unambiguous language and legislative history of the Copyright Act, VTR copying constitutes copyright infringement and that the district court contravened Congressional intent in finding — separate and apart from the fair use doctrine — an implied exception to the statutory prohibition against unauthorized copying (P.A. 4-12).[20]

Relying on two independent grounds, the Court of Appeals next ruled that the district court erred in concluding that VTR copying constitutes fair use (P.A. 12-25). The Court of Appeals initially held that since the fair use defense may be invoked only if an unauthorized use involves creation of new works, and VTR copying does not involve such independent creation, VTR copies do not qualify as fair use (P.A. 14-18). Alternatively, the Court held that the district court erred in its application of the four fair use

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[20]Petitioners now concede that the 1976 Act does not contain such an implied statutory exemption (*see* P.B. 20-21, 23, 33, 39). In this Court petitioners rely entirely on the fair use doctrine to support their contention that VTR copying does not constitute copyright infringement (P.B. 20-39).

criteria set forth in §107 of the 1976 Act, and concluded that, properly applied, these criteria require rejection of the fair use defense (P.A. 18-25).[21]

The Court of Appeals next ruled that the district court erred in concluding that petitioners are not liable as contributory infringers (P.A. 25-27).[22] In so ruling, the Ninth Circuit held that the district court misinterpreted the knowledge requirement of the contributory infringement doctrine and misapplied the staple article of commerce rationale.[23] The Court of Appeals then concluded that under the proper

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[21]The Court of Appeals first held that the fact that VTR copies are made merely for convenience weighs against the fair use defense. In so ruling, the Court rejected the district court's view that because VTR copying allegedly increases access to broadcast material this non-productive copying constitutes fair use (P.A. 19). The Court of Appeals then ruled that the expense and the creative and entertainment nature of respondents' motion pictures tip strongly against the fair use defense, rejecting the district court's conclusion that VTR copying is justified because respondents' works are presented through the broadcast medium (P.A. 20-21). The Court of Appeals next held that the fact that VTR copying generally involves copying the entire work weighs against the fair use defense (P.A. 21-22). Finally, as to the effect of VTR copying on the potential market for or value of respondents' works, the Court held that the district court erred in (a) placing the burden of proving this element of the defense on respondents rather than on petitioners, (b) applying an incorrect legal standard and (c) failing to recognize that under the correct standard, the requisite potential adverse impact exists as a matter of law (P.A. 22-25).

[22]The Court of Appeals did not consider respondents' contentions that petitioners are also liable under the doctrines of direct infringement, vicarious liability and unfair competition. These issues are therefore not before this Court. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 102 S.Ct. 2182, 2190 (1982).

[23]The Court of Appeals held that the district court erred in refusing to hold petitioners liable merely because VTRs may have some non-infringing uses, stressing that any such non-infringing uses can be accommodated in this copyright case by fashioning appropriate relief (P.A. 25-26, 28). The Court of Appeals further held that since any such uses are not substantial, the staple article doctrine is inapplicable (P.A. 25-26).

legal test, petitioners' admitted activities constitute contributory infringement as a matter of law (P.A. 27).[24]

Finally, the Court of Appeals remanded the case to the district court to fashion an appropriate remedy, observing that a continuing royalty may be an appropriate "resolution in this context" (P.A. 28-29). In so doing, the Court of Appeals noted that the "district court is in a better position [than the Court of Appeals] to resolve, in an appropriate fashion, the relief question" and therefore declined to direct the entry of any particular type of relief on remand (P.A. 28).

D. Congressional Reaction to the Court of Appeals' Decision.

In response to the Court of Appeals' decision, several bills were introduced in Congress dealing with home video recording. The initial bills seek to exempt home video recording from copyright liability without compensating copyright owners.[25] These bills would essentially overturn the decision below. Several subsequent bills, while completely exempting VTR owners from liability, would exempt VTR manufacturers and distributors only if they pay compulsory

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[24]In so ruling, the Court of Appeals relied on the district court's findings and petitioners' admissions that (a) Betamax is manufactured, advertised and sold for the primary purpose of reproducing television programming, (b) petitioners' advertisements exhort such copying, (c) Betamax in fact contributes to VTR copying, and (d) petitioners knew that Betamax would be used to copy copyrighted works, including works produced by respondents (P.A. 41-42, 96-97; *see* notes 91, 92, 95, 99 & accompanying text, *infra*).

[25]S. 1758, 97th Cong., 1st Sess., 127 Cong. Rec. S11810 (daily ed. Oct. 21, 1981); H.R. 4783, 97th Cong., 1st Sess., 127 Cong. Rec. H7504 (daily ed. Oct. 20, 1981); H.R. 4794, 97th Cong., 1st Sess., 127 Cong. Rec. H7504 (daily ed. Oct. 20, 1981); H.R. 4808, 97th Cong., 1st Sess., 127 Cong. Rec. H7591 (daily ed. Oct. 21, 1981); H.R. 5250, 97th Cong., 1st Sess., 127 Cong. Rec. H9928 (daily ed. Dec. 16, 1981).

royalty fees to copyright owners.[26] These latter bills, which are supported by the United States Copyright Office,[27] would modify the decision below and retain copyright protection against mass uncompensated VTR copying. Versions of all bills are expected to be re-introduced when the Ninety-eighth Congress convenes in January, 1983.

SUMMARY OF ARGUMENT.

The Ninth Circuit correctly held that home VTR copying violates the Copyright Act and that petitioners are contributory infringers. This result is compelled by the language, structure and legislative history of the Act and time-honored principles protecting copyrighted works.

I.

The purpose of the fair use doctrine is to promote creativity in areas of universal social concern such as criticism, scholarship or research by permitting authors to make limited use of the works of others in creating new works. The fair use defense thus may be invoked only where the unauthorized activity results in the creation of new works. Since home VTR copying involves no independent creativity and therefore does not meet the fundamental justification for the fair use defense, the defense is inapplicable.

Even if this lack of independent creation were overlooked, home VTR copying would not satisfy the four statutory criteria used to determine whether a given use is fair (17 U.S.C. §107). This copying is merely for the convenience

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[26]Amendment No. 1242 to S. 1758, 97th Cong., 1st Sess., 127 Cong. Rec. S15723-24 (daily ed. Dec. 16, 1981); Amendment No. 1331 to S. 1758, 97th Cong., 2d Sess., 128 Cong. Rec. S. 1287-90 (daily ed. Mar. 1, 1982); Amendment No. 1333 to S. 1758, 97th Cong., 2d Sess., 128 Cong. Rec. S1675 (daily ed. Mar. 4, 1982); H.R. 5488, 97th Cong., 2d Sess., 128 Cong. Rec. H333 (daily ed. Feb. 9, 1982); H.R. 5705, 97th Cong., 2d Sess., 128 Cong. Rec. H664 (daily ed. Mar. 3, 1982).

[27]Register's House Statement, *supra* note 6, at 4-7; Register's Senate Statement, *supra* note 6, at 4-7.

of the viewer, is not for a traditionally accepted purpose such as criticism, comment, news reporting, teaching, scholarship or research, involves taking *entire* works which are entertainment — rather than informational — in nature, and results in the making of an unlimited number of copies (often without the accompanying broadcast commercials) which serve the same function as and compete with the copyrighted originals. Under established case law interpreting the four fair use criteria, these characteristics individually and collectively require rejection of the fair use defense.

Nor does federal communications policy support petitioners' central argument that because VTR copying increases access to works broadcast on the public airwaves, settled fair use principles should be disregarded. This argument, which would essentially override all statutory copyright protection for televised works, has been categorically rejected by Congress as well as by this Court.

Moreover, the overall statutory scheme and legislative history of the 1976 Act demonstrate special concern for the protection of motion pictures and overwhelmingly refute petitioners' contention that Congress intended home VTR copying of these works to be fair use. Accordingly, the Court of Appeals' rejection of the fair use defense was proper in all respects.

II.

A contributory infringer is one who knowingly induces, causes, furthers or materially contributes to the infringing activity of another. This test is satisfied here. Given the district court's findings and petitioners' admissions that petitioners manufacture, advertise and sell Betamax for the primary purpose of reproducing programming from television, especially copyrighted motion pictures, that Betamax sales contribute to such copying, that petitioners know and intend that Betamax will be used to copy copyrighted works owned by respondents and others, and that petitioners ac-

tively encourage such infringing activity through their advertisements, brochures and instruction manuals, the Court of Appeals was compelled under established authority to hold petitioners liable as contributory copyright infringers.

Petitioners' reliance on the patent law's staple article of commerce doctrine to shield them from contributory copyright infringement liability is misplaced. Petitioners predicate their staple article argument on their belief that it would be difficult or impossible to devise a remedy in this case without unjustifiably inhibiting alleged non-infringing uses of VTRs. However, once liability is established under accepted legal principles, it is impermissible to deny relief merely because the fashioning of an appropriate remedy may be difficult. Moreover, there are remedies, such as a continuing royalty, that can accommodate any potential non-infringing uses. The staple article of commerce theory is also inapposite because it is found in the patent statute — not the copyright statute — and represents a legislative balance of competing considerations unique to patent law.

Even if it were proper in a copyright case to analogize to the staple article doctrine, that doctrine would not absolve petitioners of liability here. The staple article theory shields the seller of a staple article from contributory infringement liability only if (a) the seller does not actively cause, urge, encourage or aid purchasers to use the article for infringing purposes, and (b) the article is suitable and actually used for *substantial* non-infringing uses. The uncontroverted evidence and the district court's findings establish both that petitioners cause, urge, encourage and aid infringing VTR copying and that VTRs do not have actual, substantial non-infringing uses. Accordingly, the Court of Appeals properly rejected the staple article argument.

III.

Since the district court has not yet considered the remedy question, it would be premature for this Court to do so without the benefit of a factual record. In any event, general

equitable principles incorporated in the Copyright Act as well as specific provisions of that Act make clear that the district court has the authority to impose a continuing royalty in lieu of an injunction.

IV.

The "clearly erroneous" standard of Fed. Rule Civ. Proc. 52(a) does not apply to review of a district court's legal conclusions drawn from facts found at trial. Since the Court of Appeals merely held that the facts found by the district court did not support the legal conclusions which the district court drew therefrom, Rule 52(a) is inapplicable.

ARGUMENT.

I.
VTR COPYING DOES NOT CONSTITUTE FAIR USE.

The Court of Appeals relied on two independent grounds in ruling that VTR copying does not constitute fair use. First, it held that infringing activity such as VTR copying which does not involve a "productive use" — *i.e.*, a use of the copyrighted original to create a new work — can never constitute fair use (P.A. 14-18). Alternatively, the Court held that even if the non-productive character of VTR copying were overlooked, a balancing of the traditional four fair use criteria codified in §107 of the 1976 Act requires rejection of the fair use defense (P.A. 18-25).

Petitioners seek to overturn each of these holdings, asserting that independent creativity is not necessary to establish the fair use defense and that the Court of Appeals erred in its analysis of the traditional four fair use factors. However, the Ninth Circuit's determination that VTR copying is not fair use is fully consistent with all applicable statutory and judicial authorities.[28]

A. VTR Copying Is Not Fair Use Because It Does Not Involve Independent Creation.

The district court found that "in this case there is no independent use. Betamax owners use the copy for the same purpose as the original. They add nothing of their own" (P.A. 81). The Court of Appeals called this use "intrinsic use," meaning that it does not result in the creation of new intellectual works (P.A. 15-18). The Court of Appeals correctly reasoned that such non-productive use does not qual-

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[28]Section 107 of the 1976 Act is a codification of the judicially created fair use doctrine. 1976 House Report 65. The 1976 Act "endorses the purpose and general scope of the judicial doctrine" and does not "change, narrow, or enlarge it in any way." *Id.* at 66. The fair use question in this action therefore must be resolved according to settled principles of fair use case law.

ify as fair use because it does not fulfill the underlying purpose of the fair use doctrine (P.A. 15-18).

Petitioners' characterization of this holding as "inflexible" and "contrary to the spirit of §107" (P.B. 29) manifests a fundamental misconception of the limited purpose and scope of fair use. The doctrine is not an omnibus defense applicable in all contexts. It is available only in those few situations where rigid application of the copyright statute "would stifle the very creativity which that law is designed to foster."[29] Thus, application of the fair use doctrine is limited to uses by subsequent authors who build on the works of others to create new works.[30] Without some independent creation, there can be no fair use.[31]

In holding that VTR copies do not constitute fair use, the Court of Appeals correctly recognized the limits of the fair use doctrine.[32] Since VTR copies involve no independent

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[29]*Iowa State University Research Foundation v. ABC*, 621 F.2d 57, 60 (2d Cir. 1980); *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 83 (1st Cir. 1981).

[30]*Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966); L. Seltzer, *Exemptions and Fair Use in Copyright* 24 (1978) ("Seltzer"). *See Elsmere Music v. NBC*, 623 F.2d 252, 253 n. 1 (2d Cir. 1980) (per curiam).

[31]*Wainwright Secs. Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94, 96-97 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Benny v. Loew's, Inc.*, 239 F.2d 532, 536 (9th Cir. 1956), *aff'd by equally divided court*, 356 U.S. 43 (1958); Seltzer, *supra*, at 24.

[32]*Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided court*, 420 U.S. 376 (1975), relied upon by petitioners, did not expand application of the fair use doctrine beyond these limits. In *Williams & Wilkins*, the Court of Claims held that library photocopying by the Government of individual articles from copyrighted medical journals was fair use. Despite petitioners' contrary assertion (P.B. 27), this copying was not an intrinsic use. Although nothing new was added to the copies at the time they were made, they were subsequently used for medical research purposes and thus constituted a permissible productive use. For this reason, the Court of Appeals found *Williams & Wilkins* "clearly distinguishable" from the instant case (P.A. 16-17). The district court agreed, stating that *Williams & Wilkins* "has little precedential value" and is "specifically limited to its unique factual situation" (P.A. 73). *Accord*, S. Rep. No. 94-473, 94th Cong., 1st Sess. 71 (1975) ("1975 Senate Report").

creation, they simply do not fall within "the fundamental justification for the [fair use] privilege . . . to wit, 'to promote the progress of science and the useful arts.' " *Rosemont Enterprises, Inc. v. Random House, Inc., supra*, 366 F.2d at 307; *Rubin v. Boston Magazine Co., supra*, 645 F.2d at 83. Where, as here, this fundamental purpose is not fulfilled, the fair use defense may not be invoked (P.A. 15-18).

B. Under a Balancing of the Four Fair Use Criteria VTR Copying Is Not Fair Use.

The Court of Appeals did not, as petitioners suggest (P.B. 28-29), end its fair use analysis after concluding that VTR copying constitutes impermissible non-productive use. Rather, the Court went on to consider each of the four fair use factors listed in §107 (P.A. 18-25). Its conclusion that each of these factors requires rejection of petitioners' fair use defense is correct in all respects.

1. Purpose and Character of the Use.

The fair use doctrine was developed to promote the "public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry."[33] Accordingly, as recognized by both courts below, the purpose and character of the use factor has traditionally been analyzed by determining whether the copyrighted material is used for criticism, scholarship, news reporting or other utilitarian purposes (P.A. 19, 81).[34] Be-

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[33]*Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Wainwright Secs. Inc. v. Wall Street Transcript Corp., supra*, 558 F.2d at 94.

[34]Indeed, the defense has previously been allowed *only* when the unauthorized use is for a purpose such as criticism, comment, news reporting, scholarship or research. *E.g., Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980) (use for comparative advertising); *Williams & Wilkins Co. v. United States, supra*, 487 F.2d 1345 (use for medical research); *Rosemont Enterprises, Inc. v. Random House, Inc., supra*, 366 F.2d 303 (use for preparation of biography); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964) (use for parody); *see* H.R. Rep. No. 83, 90th Cong., 1st Sess. 31 (1967) (§107 is intended "to characterize a fair use as generally being 'for purposes such as criticism, comment, news reporting, teaching, scholarship or research' ") ("1967 House Report").

cause VTR copies do not involve a traditionally accepted purpose, the Court of Appeals determined that this factor weighs against a finding of fair use (P.A. 19). This conclusion is further necessitated by the fact — conceded by petitioners and acknowledged by the district court (R. 965; PX 113, ¶3; P.A. 82) — that VTR copies are made for entertainment and convenience. Congress made clear in passing the 1976 Act that off-the-air recording merely for convenience cannot under any circumstances be fair use.[35]

The district court disregarded the foregoing authorities based on its findings that VTR copying (1) takes place in the home, (2) for non-commercial purposes, (3) allegedly to increase access to television broadcasts (P.A. 81-82). In reversing, the Court of Appeals correctly held that these attributes do not render VTR copying fair use.

That VTR copies are generally made in the home has no relevance in assessing the first fair use factor. The purpose, character and effect of VTR copying by an individual in the home are no different from the purpose, character and effect of copying by the same individual outside the home. Moreover, as the Court of Appeals ruled, any privacy concerns raised by the "in home" locus of VTR copying may appropriately be considered in fashioning the remedy; but these concerns do not justify a blanket fair use exemption from liability (P.A. 19). For, it is settled that Congress may validly prohibit the unauthorized taking and retention of property, including films and tapes, in homes.[36]

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[35]1975 Senate Report 66 ("[t]he Committee does not intend to suggest however, that off-the-air recording for convenience would under any circumstances, be considered 'fair use' "). *Cf. F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 214 U.S.P.Q. (BNA) 409, 415 (7th Cir. Mar. 25, 1982) ("[a] copyright owner is not required to market its copyrights in a form most convenient to its customers").

[36](P.A. 65); *Stanley v. Georgia*, 394 U.S. 557, 568 n. 11 (1969). This Court has made clear that the constitutional right of privacy encompasses "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . ." *Roe v. Wade*, 410 U.S. 113, 152 (1973). The making of unauthorized recordings of copyrighted works obviously is not such a fundamental right.

Similarly, the fact that VTR copies may be used generally for non-commercial private playbacks (*i.e.*, private performances) does not render VTR copying permissible (P.A. 19). It is true that private performances do not constitute copyright infringement. *See* 17 U.S.C. §106(4). However, the right to perform a copyrighted work privately "contemplates that the . . . work is performed from memory or from *legal* copies. Neither the [in home] element nor the nonprofit element of a performance will protect illegal copying. . . ."[37]

Petitioners' additional claim that VTR copying is immune from liability because it is merely a mechanical step for later viewing is also unpersuasive. All unauthorized reproductions are for subsequent viewing or reading. Thus, this characteristic actually highlights that VTR copying is no different from any other infringing copying.

Finally, that VTR copying purportedly increases access to broadcast works does not justify such copying as fair use.[38] In the courts below, petitioners based their access argument primarily on the First Amendment, contending

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[37]*F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago, supra*, 214 U.S.P.Q. at 411 (emphasis added). As both courts below recognized, a non-profit motive, although relevant, is not sufficient in and of itself to establish fair use (P.A. 19 n. 9, 81; *see* 1976 House Report 66).

[38]The assumption underlying the increased access argument — that VTRs are used exclusively to permit viewing of broadcasts of copyrighted works which would otherwise be missed — is factually inaccurate. According to petitioners' own survey, 17.6% of Betamax recordings are made while Betamax owners are watching the live broadcast of the show being recorded (P.A. 48; DX OT (Table 16)). Since those owners view the original broadcast, they obviously do not need to make simultaneous recordings to obtain "access." The survey also shows that over 41% of Betamax recordings have been or will be viewed more than once (DX OT (Table 43)). Other surveys in evidence establish that most Betamax owners retain off-the-air recordings in home video libraries (*see* note 11, *supra*). Multiple replays and retention of library recordings are certainly not necessary for "access." Thus, despite petitioners' contrary suggestion (*e.g.*, P.B. 5), this case involves far more than simply time-shifting for purposes of increased access.

that the First Amendment guarantees the greatest possible access to reception of ideas even if this reception involves taking entire copyrighted works (P.A. 19, 82). The Court of Appeals rejected this argument, reasoning that " '[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property' " (P.A. 19) (*quoting Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979)). In so ruling, the Court of Appeals followed an unbroken line of authority holding that the First Amendment is no defense to copying of entire copyrighted works, including works broadcast on television.[39] This result obviously is correct if the Copyright Act is to have any vitality whatsoever: copyright protection by definition inhibits access.[40]

Apparently recognizing the futility of their First Amendment argument, petitioners now contend that their increased access justification for the fair use defense, although carrying First Amendment overtones, lies primarily in the national public policy underlying the Communications Act of 1934, 47 U.S.C. §§151 *et seq.* (P.B. 24-27). In short, petitioners argue that national communications policy over-

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[39]*Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n. 13 (1977) ("*Zacchini*"); *Roy Export Co. v. CBS*, 672 F.2d 1095, 1099-1100 (2d Cir.), *cert. denied*, 51 U.S.L.W. 3254 (U.S. Oct. 5, 1982) (No. 81-2111); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., supra*, 562 F.2d at 1171; *Wainwright Secs. Inc. v. Wall Street Transcript Corp., supra*, 558 F.2d at 95; *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F.Supp. 1156, 1180-81 (W.D. N.Y. 1982) ("*Encyclopaedia Britannica II*"). *See Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., supra*, 626 F.2d at 1178-82 (Brown, J., concurring in part and dissenting in part).

[40]*E.g., Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("[t]he owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property"); *Iowa State University Research Foundation, Inc. v. ABC, Inc., supra*, 621 F.2d at 62.

rides statutory copyright protection against unauthorized copying of copyrighted works. The argument lacks merit.[41]

The issue raised by petitioners was specifically addressed and unequivocally set to rest by Congress when it enacted the Communications Act of 1934. That Act states:

> "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."
> 47 U.S.C. §414.

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[41]The argument is based on a patchwork of statements by this Court having nothing to do with the effect of federal communications policy on copyright law. Most of the cases relied upon by petitioners do not even involve copyright. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *NBC v. United States*, 319 U.S. 190 (1943).

Furthermore, the few copyright cases mentioned by petitioners (*Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975)) all involve public performance of copyrighted works, not *copying*, and with one exception (*see* note 42 & accompanying text, *infra*) do not address the interrelationship between copyright law and federal communications policy. These cases — none of which involves the fair use doctrine — merely hold that certain retransmissions of broadcast television and radio signals did not constitute public performances under the 1909 Act. Congress, however, overruled or severely restricted application of each of these cases in the 1976 Act. 17 U.S.C. §§110(5), 111; 1976 House Report 63, 87, 86-101; H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. 75 (1976) ("Conference Report"). Moreover, these cases were all based on the fact that the retransmissions at issue merely permitted *simultaneous* viewing and hearing of broadcast television and radio signals by the public. 392 U.S. at 399-400; 415 U.S. at 408; 422 U.S. at 157-61. In contrast, VTRs interrupt the instantaneous process of broadcasting and simultaneous viewing and replace it with a system of copying, storage, retrieval and multiple playbacks. Thus, contrary to petitioners' assertion (P.B. 18, 25), VTRs do not simply "enhance television reception." VTRs make *copies*, an activity neither considered nor condoned by *Fortnightly* and its progeny. This important distinguishing characteristic has been held to make the *Fortnightly* rationale inapplicable to VTR use. *Walt Disney Prods. v. Alaska Television Network, Inc.*, 310 F.Supp. 1073 (W.D. Wash. 1969).

In view of this clear expression of Congressional intent, this Court, the lower courts and the Federal Communications Commission have unanimously concluded that nothing in the Communications Act curtails the rights of copyright owners.[42]

The 1976 Act also dispels any notion that federal communications policy somehow precludes copyright liability for unauthorized videotaping of motion pictures from the public airwaves. Congress stated plainly that videotaping from the public airwaves merely for convenience can never be fair use (*see* note 35, *supra*). Moreover, in the rare situations in which Congress determined that videotaping from the public airwaves is justified, it provided specific statutory exemptions permitting such activity.[43] These statutory exemptions obviously would have been unnecessary had Congress believed that national communications policy provided an overriding non-statutory justification for videotaping from public airwaves. Thus, all courts which have considered the issue under the 1976 Act have held that

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[42]*E.g., Teleprompter Corp. v. CBS, Inc., supra*, 415 U.S. at 406 n. 11 ("[t]he FCC has consistently contended that it is without power to alter rights emanating from other sources, including the Copyright Act. . . . This position is consistent with the terms of the Communications Act of 1934. . . ."); *Id.* at 419 (Burger, C.J., dissenting) ("[t]here is nothing in the Communications Act that qualifies, limits, modifies or makes exception to the Copyright Act"); *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348, 349 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965) ("Congress ha[s] not pre-empted the adjustment of property rights in the communication field by passage of the Communications Act of 1934"); CATV, *Second Report & Order*, Nos. 14895, 15233, 15971, 2 F.C.C.2d 725, 768-69 (1966). *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982) (increasing the public's access to television programs transmitted by cable does not justify even a minimal taking of an apartment owner's property without fair compensation).

[43]17 U.S.C. §§108, 111(e), 112. With one limited exception not applicable to home VTR copies (17 U.S.C. §111(e)), none of these exemptions permits videotape recording of *motion pictures* from public airwaves. (*See* 17 U.S.C. §§108(h), 111(e), 112(a); 1976 House Report 78, 98, 101, 103; §I.C.1., *infra*).

the fair use doctrine does not permit unauthorized off-the-air videotaping — even for educational or news reporting purposes — merely because it increases the public's access to broadcast material.[44]

Petitioners' increased access argument proves too much. If accepted, it would logically also permit VTR owners to steal VTR tapes from petitioners to obtain increased access to television broadcasts. Neither the First Amendment nor federal communications policy condones either result. The purpose and character of VTR copies thus weigh heavily against a finding of fair use.

2. Nature of the Copyrighted Works at Issue.

Under this factor, an unauthorized use is more appropriately characterized as "fair" if the nature of the copied material is primarily informational and therefore "serve[s] the public interest in the free dissemination of information" (P.A. 20).[45] Conversely, characterization of an unauthorized use as "fair" is less appropriate if the copied work is primarily entertainment in nature (P.A. 20).[46] The availability of the fair use defense is additionally constricted if the copyrighted work is "creative, imaginative, and original" and "represent[s] a substantial investment of time and labor

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[44]*New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.*, 2 Copyrt. L. Rep. (CCH) ¶25,293, p. 16,625, at pp. 16,626-27 (D. Mass. Aug. 3, 1981) ("*New Boston Television*"); *Encyclopaedia Britannica II*, *supra*, 542 F.Supp. at 1175-77, 1179-81. *See Zacchini*, *supra*, 433 U.S. at 574-78.

[45]*Rosemont Enterprises, Inc. v. Random House, Inc.*, *supra*, 366 F.2d at 307. *Accord*, 3 Nimmer on Copyright, §13.05[A][2], at 13-63 (1982) ("Nimmer"); Seltzer, *supra*, at 33-34.

[46]*Rohauer v. Killiam Shows, Inc.*, 379 F.Supp. 723, 733 (S.D. N.Y. 1974), *rev'd on other grounds*, 551 F.2d 484 (2d Cir. 1977), *cert. denied*, 431 U.S. 949 (1977); Register's Senate Statement, *supra* note 6, at 23; 3 Nimmer, *supra*, §13.05[A][2], at 13-63. *See Zacchini*, *supra*, 433 U.S. at 573-78 (state law protection under right of publicity greater for entertainment than informational works).

made in anticipation of a financial return." *MCA INC. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981).[47]

Petitioners concede that respondents' works are primarily "entertainment" in subject matter (P.B. 29). It is also undisputed that respondents' works are highly creative, imaginative and original and represent a large investment made in anticipation of financial return.[48] Applying the established authorities to these undisputed facts, the Court of Appeals properly concluded that the nature of respondents' works weighs against a finding of fair use.

Petitioners argue that the foregoing attributes of respondents' motion pictures should be disregarded because they are voluntarily telecast over public airwaves (P.B. 29). However, use of the broadcast medium to exhibit respondents' motion pictures does not qualify VTR copies as fair use (P.A. 20-21). The proper focus obviously is on the intrinsic qualities of the infringed work, not on the medium of its presentation.[49]

3. Amount and Substantiality of Taking.

It is undisputed, and the district court found, that VTR recording "usually involves copying the entire work" (P.A. 83). Virtually every fair use case has held that such entire taking can *never* be fair use because it exceeds the bounds

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[47]Petitioners simply overlook these uncontroverted fair use principles in asserting that it is impermissible to distinguish between entertainment and informational works as §107(2) requires (P.B. 29-30).

[48]*See* notes 2 & 8, *supra;* Register's Senate Statement, *supra* note 6, at 23; Register's House Statement, *supra* note 6, at 23.

[49]*Encyclopaedia Britannica II*, *supra*, 542 F.Supp. at 1180 ("[t]he plaintiffs' choice of media . . . does not abrogate their rights as copyright holders" even if they "knew and expected that the broadcasts would be received free of charge"). *See United States v. Loew's, Inc.*, 371 U.S. 38, 48 (1962) ("a copyrighted feature film does not lose its legal or economic uniqueness because it is shown on a television rather than a movie screen").

of "reasonableness" required by the fair use defense.[50] Under these authorities, the substantiality of the taking involved in VTR copying tips decidedly against the fair use defense (P.A. 21-22).[51]

4. Effect of the Use on the Potential Market for or Value of the Copyrighted Work.

Given the excessive taking and lack of independent creation involved in VTR copying, any one of which requires rejection of the fair use defense, *see supra*, at §§I.A, I.B.3,

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[50]*E.g., Walt Disney Prods. v. Air Pirates, supra*, 581 F.2d at 756; *Rosemont Enterprises, Inc. v. Random House, Inc., supra*, 366 F.2d at 310; *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937); *Loew's, Inc. v. CBS, Inc.*, 131 F.Supp. 165, 184-85 (S.D. Cal. 1955), *aff'd sub. nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by equally divided court*, 356 U.S. 43 (1958). *See Zacchini, supra*, 433 U.S. at 574-78. Even in the case of historical and scholarly works, as distinguished from entertainment works, fair use is restricted to the copying of small excerpts. *See, e.g., Meeropol v. Nizer, supra*, 560 F.2d at 1068-71; 1975 Senate Report 61-62, 64.

Only two appellate decisions have ever intimated that copying an entire work can in any circumstance be fair use. However, these statements are mere dictum because neither decision involved the taking of entire copyrighted works. *Williams & Wilkins Co. v. United States, supra*, 487 F.2d at 1353 (copying of individual articles from copyrighted medical journals); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., supra*, 626 F.2d at 1177 n. 15 (*quoting Williams & Wilkins*) (copying of cover page of copyrighted magazine). Moreover, it has been expressly held that this dictum does not justify off-the-air videotaping of entire *motion pictures*, even for educational purposes, because such copying exceeds the bounds of reasonableness required by the fair use defense. *Encyclopaedia Britannica II, supra*, 542 F.Supp. at 1179; *Encyclopaedia Britannica Educational Corp. v. Crooks*, 447 F.Supp. 243, 251 (W.D. N.Y. 1978) ("*Encyclopaedia Britannica I*"). The House and Senate Reports also state that the fair use provisions of §107 do not permit unauthorized reproductions of *entire* motion pictures. 1976 House Report 72-73; 1975 Senate Report 64.

[51]Notwithstanding this clear line of authority, petitioners assert that copying an entire copyrighted work should be fair use unless the copyright owner demonstrates actual past or future damage from the unauthorized taking (P.B. 31). However, there is no authority whatever to support this novel approach (*see* P.A. 21-22). Indeed, such an approach would essentially render the substantiality factor meaningless by completely subordinating it to the fourth fair use factor — the effect of the use upon the value of the copyrighted work. *See Loew's, Inc. v. CBS, Inc., supra*, 131 F.Supp. at 184 ("[t]he mere absence of competition or injurious effect upon the copyrighted work will not make a use fair.").

it was unnecessary for the Court of Appeals even to consider the effect of VTR copies on the potential market for or value of respondents' motion pictures (P.A. 22). Nevertheless, the Court examined this factor and concluded that it does not support the fair use defense.

In analyzing this factor, the Court of Appeals noted that in copyright infringement cases, irreparable harm to the copyright owner is presumed unless adequately rebutted by the defendant.[52] It also recognized that to overcome this presumption, petitioners had the burden of proving that the unauthorized use would not *tend* to affect *any potential* market for or value of respondents' copyrighted works.[53]

Applying these legal principles to VTR copying, the Court of Appeals first ruled that the presumption of harm compelled the conclusion that the effect factor weighs against a finding of fair use (P.A. 23 n. 11). This conclusion was required because the district court did not, and indeed, based on the record rationally could not, find that petitioners had carried their burden of proving that VTR copying will not tend to affect any potential market for or value of respondents' copyrighted works.[54] To the contrary, the district

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[52](P.A. 23 n. 11); *Encyclopaedia Britannica I, supra*, 447 F.Supp. at 251. *Accord, Rice v. American Program Bureau*, 446 F.2d 685, 688 (2d Cir. 1971); *Uneeda Doll Co. v. Goldfarb Novelty Co.*, 373 F.2d 851, 582 n. 1 (2d Cir. 1967).

[53](P.A. 23, 24); *Meeropol v. Nizer, supra*, 560 F.2d at 1069; *Meredith Corp. v. Harper & Row Publishers, Inc.*, 378 F.Supp. 686, 689 (S.D. N.Y. 1974) (*quoting* 3 Nimmer, *supra*), *aff'd*, 500 F.2d 1221 (2d Cir. 1974).

[54](P.A. 23 & n. 11, 24); *see Encyclopaedia Britannica I, supra*, 447 F.Supp. at 247, 251.

Petitioners presented evidence on the issue from two expert witnesses. One, Mr. Blay, conceded that Betamax recordings of a copyrighted motion picture will cause respondents to lose revenue from sales of that motion picture on pre-recorded video cassettes. The other witness conceded that his testimony about the future effect of VTRs on television ratings was "just a guess" (R. 2975-76, 3054-55, 3059-61; *see* note 8, *supra*).

Despite this negligible evidence, petitioners unbelievably assert that "[t]he evidence showed that [VTR] viewing would be measured and paid for under existing practice" (P.B. 31). There was no such evidence.

court ignored the presumption of harm and sustained the fair use defense because it was "*hesitant*" to find that *respondents* had proved that future harm from VTR copying was "*probable*" (P.A. 75-78).[55] As the Court of Appeals ruled, the district court thus applied the wrong legal test in failing to recognize that a "probability" of harm is unnecessary and further erred by imposing the burden of proof on respondents, thereby placing them in the novel and onerous position of having to disprove a defense raised by petitioners (P.A. 23, 75-79).[56]

In addition to relying on the legal presumption of harm, the Court of Appeals properly ruled that the district court's fact findings established that VTR copying will tend to have the requisite potential adverse impact (P.A. 23-25). First, because VTR copies are undisputably made as complete

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Indeed, respondents' seven expert witnesses testified to the contrary (R. 250-58, 260-62, 274-77, 451-55, 539, 991-1002, 1051-52, 1182-1200, 1312-38, 1379-80, 1448-70, 1721-30). Nor did the district court find that such viewing *will* be measured or that, if measured, such measurements *will* prevent a reduction in respondents' television licensing revenues (P.A. 109). Moreover, the district court could not have made any such findings because there was no evidence from the ratings services that they are capable of measuring, or that they *will* measure, VTR playback activity (as distinguished from VTR recording activity). *See* Statement by Jay Eliasberg, former vice president, Research, CBS Broadcast Group 4-5 (April 21, 1982), *to be reprinted in* April 21 Senate Committee Hearings ___, 97th Cong., 2d Sess. ___ (1982) (meters used for audience measurement indicate that a TV set is turned on to a particular channel but cannot ascertain VTR play-backs or the extent to which commercials have been deleted).

[55]The district court acknowledged that the issue is not whether the infringement has caused *past* damage (P.A. 75). As Professor Nimmer explains: "Far from this justifying a defense of fair use, failure to prove damages will in the usual case give rise to a minimum statutory damages liability." 3 Nimmer, *supra*, §13.05[E][4][c], at 13-84. It is therefore difficult to understand the relevance of petitioners' discussion of alleged lack of evidence of past harm (P.B. 30, 31).

[56]As with any defense, the burden of proving each element of the fair use defense was on defendants (P.A. 18, 23 & n. 11); *Rubin v. Boston Magazine Co.*, *supra*, 645 F.2d at 84; *Encyclopaedia Britannica I*, *supra*, 447 F.Supp. at 251.

substitutes for the viewing of licensed broadcasts of respondents' works, the district court found that VTR copies are used "for the same purpose as the original" (P.A. 81). Under settled judicial authority, whenever the copyrighted work and the infringing copy have the same function, the fourth fair use factor must be resolved against the infringer.[57] Accordingly, the Court of Appeals held that the district court's finding that VTR copies serve the same purpose as the original required that the effect factor be resolved against petitioners (P.A. 23 & n. 13).

Second, the district court repeatedly found that respondents will have to compete in the marketplace with VTR copies of their works (*e.g.*, P.A. 78, 116). Since respondents obviously will not always prevail in such competition, the Court of Appeals ruled that this finding required the conclusion that VTR copies will *tend* to affect the value of or market for respondents' works (P.A. 23-24).

Third, the Court of Appeals recognized the obvious: the licensing of the right to make VTR reproductions is itself a potential market for respondents' copyrighted works (P.A. 24). Uncontrolled and uncompensated VTR copies interfere with respondents' ability to grant and secure a fee for licenses to copy their works off-the-air (P.A. 24).[58] That respondents have not yet attempted to exploit this potential

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[57]*MGM, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F.Supp. 351, 361 (N.D. Ga. 1979); 3 Nimmer, *supra*, §13.05[B], at 13-65-13-71. *See Iowa State University Research Foundation, Inc. v. ABC, Inc.*, *supra*, 621 F.2d at 61. Indeed, because the function of a VTR copy is the same as the copied original, petitioners' own expert conceded that a VTR owner is not likely to purchase a pre-recorded cassette of the original from respondents (*see* notes 8 & 54, *supra*). In addition, petitioners' survey shows that Betamax has caused 10.5% of all Betamax owners to decrease theater attendance and 31.4% of Betamax owners who had previously rented or purchased licensed motion pictures to decrease such activities (DX OT (Tables 6 & 9); *see* note 8, *supra*).

[58]This is neither a hypothetical nor unreal market. The ABC television network recently announced that it intends to exploit this market in late night and early morning hours through the use of new technology. *Wall Street Journal*, Apr. 30, 1982.

market does not permit petitioners "to appropriate [respondents'] copyrighted material and effectively preclude such efforts in the future."[59]

Fourth, the unlimited number of unauthorized VTR copies which Betamax makes possible also establishes the requisite potential adverse effect as a matter of law.[60] Congress stated on numerous occasions during consideration of the bills which evolved into the 1976 Act that mass proliferation of minor infringements constitutes a major inroad on the value of copyrights which cannot be justified as fair use.[61]

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[59]*New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc., supra*, 2 Copyrt. L. Rep. (CHH) at p. 16,627; *Iowa State University Research Foundation, Inc. v. ABC, Inc., supra*, 621 F.2d at 62. *See Fox Film Corp. v. Doyal, supra*, 286 U.S. at 127. The Register of Copyrights recently stressed the importance of preventing the fair use defense from swallowing such emerging markets: "[T]he specific reference [in §107] to 'potential' underscores the need to secure future markets from pre-emption, and leaves their exploitation to the designs of the copyright owner. The import is that potential markets may be as valuable as those presently exploited. Too narrow a view of adverse market impact may simply have the effect of destroying future markets. . . . *Unauthorized off-air taping prejudices the integrity of other emerging markets*." Remarks of David Ladd, United States Register of Copyrights, to the American Bar Association, Patent, Trademark & Copyright Law Section (Aug. 10, 1982), *reprinted in Patent, Trademark & Copyright Journal* (BNA), Vol. 24, No. 593, at 421-22 (Aug. 26, 1982) (emphasis added).

[60]The Electronic Industries Association estimates that 20 million VTRs will be sold in this country by 1986. Brief Amicus Curiae In Support Of Petition 6. Armed with an average of 30 cassettes per machine (P.A. 47), the owners of these devices will have approximately *600 million* cassettes available for infringing copies.

[61]*E.g.*, "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright *that must be prevented*." (Emphasis added.)

1975 Senate Report 65; 1967 House Report 35; H.R. Rep. No. 2237, 89th Cong., 2d Sess. 64 (1966). *Accord*, 1976 House Report 77. The reason for Congress' concern is obvious: the economic effect of millions of individuals making VTR copies is identical to the effect of those same individuals acquiring millions of copies from a film pirate. In both cases the unauthorized copies supplant a substantial potential market for licensed copies of respondents' works.

The massive scope of VTR copying activity thus requires rejection of the fair use defense (P.A. 24-25).

Finally, the consistency with which VTR owners delete commercials from their VTR copies (*see* note 14, *supra*) also requires the conclusion that VTR copying will tend to affect a market for respondents' works — the television licensing market. Congress explicitly recognized throughout its deliberations of the bill which became the 1976 Act that owners of televised motion pictures suffer harm when commercials telecast with such pictures are deleted without permission.[62]

A potential adverse impact on *any one* of the existing or potential markets for respondents' motion pictures would be sufficient for rejection of the fair use defense.[63] Thus, the *cumulative* potential impact on the various markets demonstrated by the district court's findings overwhelmingly establishes that the effect factor of the fair use equation weighs heavily against the defense (P.A. 23-25).

C. The Overall Statutory Scheme and Legislative History of Section 107 Confirm That VTR Copying Is Not Fair Use.

The overall statutory scheme of the 1976 Act[64] as well as its legislative history make clear that Congress did not intend §107 to permit as fair use the massive and uncontrolled VTR copying at issue here.

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[62]*E.g.*, under §111(c)(3) of the 1976 Act cable television systems cannot retransmit copyrighted television programs pursuant to the compulsory license provisions of the Act if they alter or delete the commercial messages broadcast therewith. The 1976 House Report explains that §111(c)(3) is necessary to prevent harm to the advertiser "and, in turn, the copyright owner, whose compensation for the [copyrighted] work is directly related to the size of the audience that the advertiser's message is calculated to reach." 1976 House Report 93-94.

[63]*Meeropol v. Nizer*, *supra*, 560 F.2d at 1070; *see MGM, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, *supra*, 479 F.Supp. at 360-61.

[64]In interpreting a statutory provision, courts must be guided by the legislative intent evidenced by the overall scheme of the statute taken as a whole. *Richards v. United States*, 369 U.S. 1, 11 (1962).

1. The Overall Statutory Scheme Compels the Conclusion That VTR Copying Is Not Fair Use.

The 1976 Act sets forth the copyright owner's exclusive rights in broad terms, subject only to narrowly-defined limitations, qualifications and exemptions contained in §§107-118. Thus, unless the Act expressly exempts from liability a particular use of a copyrighted work, the use falls within the copyright owner's exclusive rights.[65]

This carefully drawn statutory scheme demonstrates special Congressional concern for the protection of motion pictures, a concern which contradicts petitioners' contention that Congress intended a blanket fair use exemption for VTR copying of those works. Indeed, with one narrow exception (*see* note 69 & accompanying text, *infra*), Congress refused to permit reproduction of motion pictures for any purpose.[66]

The most graphic example of Congress' desire to protect motion pictures is found in the ephemeral recording exemption, 17 U.S.C. §112. Section 112 permits copying of some copyrighted works so long as the copies are destroyed within a specified time period. However, that provision does not allow copying of *motion pictures* under any circumstances. This intentional exclusion of motion pictures from the scope of §112 represents a change from prior bills. Congress explained this change as follows:

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[65]1976 House Report 61; 1975 Senate Report 57; Register's House Statement, *supra* note 6, at 18-19; Register's Senate Statement, *supra* note 6, at 18-19.

[66]The statutory scheme also requires the conclusion, now conceded by petitioners, that the 1976 Act contains no implied statutory home use exemption (P.A. 4-12; P.B. 20-21, 23, 33, 39). Not only does the Act confer a higher degree of protection to motion pictures than to all other works, but none of the express exemptions in §§107-118 permits the copying of *any* work for private use. It is therefore clear that Congress did not intend a statutory home copying exemption for motion pictures or any other works. *See Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978); Appellants' Opening Ninth Circuit Brief 11-17.

> "Very strong criticism was leveled at the 1965 bill because it would have permitted the making of ephemeral recordings of all types of works, including motion pictures and other audiovisual works. The producers of these materials argued that bootlegging of illegal copies is already a serious problem, and that a provision allowing duplication by an indefinite number of transmitters and without permission from the copyright owner would greatly aggravate the situation. *The committee concluded that the special nature of motion pictures and audiovisual works makes them exceptionally vulnerable to copyright impairment under an ephemeral recording exemption, and therefore removed them from the scope of Section 112.*"
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> 1967 House Report 61 (emphasis added).[67]

Similarly, although §108 permits reproduction of certain copyrighted works for library and archival purposes, motion pictures are specifically excluded from the exemption. 17 U.S.C. §108(h).

Section 111 shows a like concern for the protection of motion pictures, particularly televised motion pictures. Under §111, cable television retransmission of motion pictures is permitted, but only if royalties are paid to the copyright owner and no portion of the motion pictures or the commercial messages transmitted therewith is deleted during the

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[67]Congress thus did not intend to excuse unauthorized copying of motion pictures merely because the copies are later erased. The Register of Copyrights expressed similar sentiments in his 1965 Report, noting that the exclusive §106(1) right to reproduce embraces *all* copies, whether or not they are later erased: "reproduction on magnetic tape would come within clause (1) *even though the tape is later erased.*" Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, Copyright Law Revision, Part 6 at 16-17, 89th Cong., 1st Sess. (1965) ("Register's 1965 Supplementary Report") (emphasis added). Time-shift recordings are thus on no different footing than other unauthorized copies merely because they are erased after they are made.

retransmission.[68] Furthermore, §111(e), the sole exemption for VTR copying of motion pictures in the Act, permits such copies only for limited use by off-shore cable television systems, and, again, only if royalties are paid and commercials are not deleted.[69]

Given Congress' special solicitude for the protection of motion pictures and its recognition of the unusual vulnerability of such works to copyright impairment, it is clear that Congress never intended a blanket fair use exemption for unlimited home VTR copying of motion pictures. This conclusion is compelled by the legislative history of §107.

2. The Legislative History of Section 107 Compels the Conclusion That VTR Copying Is Not Fair Use.

The legislative history of §107 demonstrates the same concern for motion pictures found in all other provisions of the Act.[70] Indeed, Congress stressed that applicability of the fair use doctrine is "narrowly circumscribed" and must "be applied strictly to" unauthorized uses of motion pictures. 1975 Senate Report 65, 64. Consistent with this special concern for motion pictures, Congress emphasized that

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[68]In a similar vein, the other performance exemptions contained in the Act (§§110, 118) have only limited application to unauthorized uses of motion pictures. Sections 110(2), (3), (4), (6), (7), (8) and (9) apply only to musical works and literary works — not to motion pictures. And, although §§110(1) and (5) permit limited unlicensed performances of copyrighted works, including motion pictures, they do not permit unauthorized reproductions. Furthermore, while §118 permits public broadcasting entities, upon paying a royalty, to broadcast copyrighted works without permission of the copyright owner, §118(f) expressly excludes audiovisual works — including motion pictures — from the exemption.

[69]17 U.S.C. §111(e); 1976 House Report 98.

[70]Petitioners' representation that the Court of Appeals refused to consider the legislative history of §107 (P.B. 16, 32-33) is irresponsible. In rejecting the fair use defense, the Court thoroughly considered the legislative history of the 1976 Act in general and §107 in particular (P.A. 4-12, 14, 20, 24 & n. 14).

it did not intend off-the-air tape recordings to have any special status under the fair use doctrine.[71]

Definitive proof that Congress did not intend a blanket fair use exemption for VTR copying is found in the 1976 House Report's specific rejection of a similar exemption for reproductions made "for educational and scholarly purposes." 1976 House Report 66-67. Since Congress rejected a blanket exemption for educational and scholarly use (a far more salutary use than home use), it follows that Congress did not intend a blanket fair use exemption for home VTR copying of motion pictures.

Finally, Congress' recognition that "[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented," and its unequivocal statement that "[t]he committee does not intend to suggest . . . that off-the-air recording for convenience would under any circumstances, be considered 'fair use' " (1975 Senate Report 65, 66) conclusively illustrate that Congress did not intend §107 to provide a blanket exemption for the making of millions of VTR copies for convenience.

Post-enactment history of §107 also demonstrates that the Ninth Circuit properly rejected the fair use defense.[72] Several bills were introduced in response to the Court of Appeals' decision (*see* notes 25, 26 & accompanying text, *supra*). During hearings on those bills, David Ladd, the

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[71] "[T]he reference to fair use [in §107] 'by reproduction in copies or phonorecords or by any other means' is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use; it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use."
1976 House Report 66.

[72] Although not accorded the same weight as pre-enactment legislative history, post-enactment history is relevant in determining the intended scope of legislation. *North Haven Bd. of Ed. v. Bell*, 102 S.Ct. 1912, 1923-25 (1982).

Register of Copyrights who is charged with administration of the 1976 Act, stated emphatically that the Ninth Circuit correctly interpreted the fair use provisions of the 1976 Act.[73] At these same hearings, several Congressmen, Jon A. Baumgarten, General Counsel of the Copyright Office at the time the 1976 Act was enacted, and Professor Melville B. Nimmer, the country's leading copyright expert, also expressed their unqualified agreement with the Ninth Circuit's interpretation of the fair use doctrine.[74]

In the face of this overwhelming expression of legislative intent, petitioners' attempt to divine from legislative history a blanket fair use exemption for VTR copying is unpersuasive. Petitioners do not base their analysis on any legislative history of §107. Rather, they focus entirely on legislative

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[73] "Making a copy of an audio visual work under copyright through the use of a videorecorder infringes the reproduction right of Section 106.

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At the time of passage of the 1976 Copyright Act, videotaping was a known technology, yet no specific exemption was included in the legislation to exempt the practice in the home.

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Despite the absence of an explicit exemption for home videotaping, proponents of unrestricted videotaping have often cited the fair use provision of section 107 in support of their views. Yet the terms of that provision and its legislative history do not support such a sweeping interpretation.

None of the purposes articulated in [§107] fits home videotaping. . . . *[T]he four factors listed in Section 107 would not excuse unrestricted videotaping, as the Ninth Circuit held in the Betamax case.*" Register's House Statement, *supra* note 6, at 19, 22, 23, 25 (emphasis added); Register's Senate Statement, *supra* note 6, at 19, 22, 23, 25 (emphasis added).

[74] *E.g.*, 128 Cong. Rec. H322 (daily ed. Feb. 9, 1982) (Statement of Rep. Edwards); Baumgarten, "Private Audio Recording of Copyrighted Music" 1-9 (Apr. 21, 1982), *to be reprinted in* April 21 Senate Committee Hearings ___, 97th Cong., 2d Sess. ___ (1982) (Memo for Nat'l Music Publishers' Ass'n, Mar. 8, 1982); Nimmer, "The Legal Status of Home Audio Recording of Copyrighted Works" 1-2, 16-26 (Apr. 21, 1982), *to be reprinted in* April 21 Senate Committee Hearings ___, 97th Cong., 2d Sess. (1982) (Statement of Recording Industry Ass'n of America, et al.).

history concerning the performance right granted in §106(4), the ephemeral recording exemption contained in §112 and the rights granted to sound recordings in the 1971 Sound Recording Act.[75] More importantly, the result which petitioners seek to deduce from this history clashes head-on with Congress' expressed intention (a) to grant special protection to motion pictures under the Act as a whole and §107 in particular and (b) to refrain from granting special fair use status to VTR copies.

Petitioners' reliance on the 1961 Report of the Register of Copyrights concerning the scope of a copyright owner's performance right is particularly inapposite (P.B. 33-34). The report advocates only that the 1976 Act, like the 1909 Act, not grant copyright owners the right to control private performances of copyrighted works. The report does not suggest that unauthorized private VTR copying be permitted as a necessary adjunct of the private performance right. To the contrary, such private performances presuppose the use of *lawfully made* copies.[76] Thus, the public's right privately to perform copyrighted works cannot possibly encompass unconsented copying such as VTR copying. Were the law otherwise, it would be legal to steal a print of a motion picture or to make an unauthorized reproduction in a movie theater so long as the sole purpose of the theft or reproduction were to allow a subsequent private performance by the offender. Such activities are, of course, prohibited.[77]

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[75]Pub. L. No. 92-140, 85 Stat. 391 (1971).

[76]*See* note 37 & accompanying text, *supra*.

[77]*See Elektra Records Co. v. Gem Elec. Distribs., Inc.*, 360 F.Supp. 821 (E.D. N.Y. 1973).

Petitioners' citation to statements of respondents at Congressional hearings in 1965 is also unavailing. Petitioners note that while referring to the prospective development of home use VTRs respondents "made no assertion that home use recording . . . should be infringement" (P.B. 34). However, petitioners overlook that as early as *1962* the Motion Picture Association of America ("MPAA"), the representative of respondents and supporting *amici*, had already registered respondents' strong objections to such activities. Statement of MPAA, March 2, 1962, *in* Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights 345, 351, 88th Cong., 1st Sess. (House Comm. Reprint) (1963) (App. B hereto).

The legislative history of the Sound Recording Act of 1971 also fails to support petitioners' fair use argument (P.B. 34-39). The Sound Recording Act and accompanying House Report unequivocally state that the Act did not apply to motion pictures and therefore did not limit or alter the rights in motion pictures in any way.[78] Accordingly, even if Congress in 1971 intended home copying of sound recordings — a practice which unlike video recording was common and unrestrained for over 20 years — to be fair use, Congress did not also intend such an exception to apply to the incipient practice of making VTR copies of televised motion pictures.[79]

Furthermore, assuming *arguendo* that Congress had intended to impose a home recording limitation on the rights granted in the 1971 Sound Recording Act, Congress clearly

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[78]The Act defined sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds, *but not including the sounds accompanying a motion picture*." 1909 Act §26 (emphasis added). The 1971 House Committee Report explained: "In excluding 'the sounds accompanying a motion picture' from the scope of this legislation the Committee does not intend to limit or otherwise alter the rights that exist currently in such works." H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 5-6 (1971), *reprinted in* [1971] U.S. Code Cong. & Ad. News 1566, 1570-71 ("1971 House Report"). *Accord*, 1976 Act §101.

[79]This distinction between the protection afforded motion pictures and sound recordings is consistent with the disparate treatment of these different classes of works throughout the history of the Copyright Act. Whereas motion pictures were granted copyright protection in 1912 (P.A. 11 n. 7), sound recordings did not receive such protection until 1971 when the immediate threat of commercial record piracy made interim protection imperative. 1971 House Report 1-2. Moreover, although the Copyright Act has always prevented imitation of all copyrighted works, including motion pictures, the Sound Recording Act prohibited only complete duplication, and specifically allowed imitation. (17 U.S.C. §1(f). *Accord*, 17 U.S.C. §114(b).) Similarly, although the proprietors of all copyrighted works have always enjoyed an exclusive performance right, no such right was granted to proprietors of sound recordings (1976 House Report 106. *Accord*, 17 U.S.C. §114(a)). Thus, *if* the 1971 Sound Recording Act contained a home recording exemption it was merely another example of the differing treatment of motion pictures and sound recordings under the 1909 Act.

did not intend to carry forward that exemption in the 1976 Act. In contrast to the 1971 House Report relied upon by petitioners (P.B. 36 n. 41), the 1976 House Report makes no reference to a home recording exemption, even for sound recordings. Indeed, the Report makes clear that subject only to the narrow exceptions contained in §§107-118, the 1976 Act precludes *all* off-the-air recording of sound recordings whether or not done in the home.[80] As the Court of Appeals recognized, it would therefore be improper to imply Congressional intent for a fair use home recording exemption in the 1976 Act from the history of an entirely different bill, *i.e.*, the Sound Recording Act of 1971.[81] It is Congress' intention in 1976, not in 1971, that is signficant in interpreting the 1976 Act. *See North Haven Board of Education v. Bell, supra*, 102 S.Ct. at 1922.

Finally, the isolated references to video recording made between 1961 and 1971 by individual witnesses and legislators fall far short of establishing a Congressional intent to bring VTR copies within the fair use doctrine. The unequivocal statements in the 1976 House Report and the 1975 Senate Report, which indicate that Congress did not intend VTR copying to be fair use, are undeniably the most persuasive indicia of Congressional intent, and take precedence over isolated comments made in committee hearings or floor debates more than five years prior to passage of the 1976 Act.[82] That these comments were made extemporaneously

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[80] "Thus, infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, *recapturing off the air*, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work."
1976 House Report 106 (emphasis added).

[81] (P.A. 10 n. 5); 3 Nimmer, *supra*, §13.05[F], at 13-96 n. 159; *see Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 390-94 (1951).

[82] *Zuber v. Allen*, 396 U.S. 168 (1969); *United States v. International Union, etc.*, 352 U.S. 567, 585 (1957).

during discussion of issues unrelated either to the copying of televised motion pictures or to fair use highlights their unreliability. It is settled that such isolated statements cannot form the basis for statutory interpretation when Congress *as a whole* did not engage in a considered review of the issue at hand.[83]

II.
PETITIONERS ARE LIABLE AS CONTRIBUTORY INFRINGERS FOR UNAUTHORIZED VTR COPYING.

A. The Court of Appeals' Application of Contributory Copyright Infringement Principles Was Correct in All Respects.

From a practical standpoint, contributory infringement is the most important issue in this case. If petitioners are absolved of liability as contributory infringers, to obtain adequate relief respondents will be faced with the prospect of bringing suits against each of the millions of VTR owners

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[83] *Tennessee Valley Authority v. Hill*, *supra*, 437 U.S. at 191-93; *Libby Rod & Gun Club v. Poteat*, 594 F.2d 742, 746 (9th Cir. 1979). It is obvious that the comments relied upon by petitioners do not represent a considered review by Congress as a whole of the complex home video recording issue. Petitioners feebly respond that there was no need for a considered review because "there was no diversity of opinion" on the issue (P.B. 32). It is difficult to understand how petitioners can conclude that there was no diversity of opinion among Congress *as a whole* when only three Congressmen (P.B. 35 n. 39, 37 n. 42) and no Senators ever expressed any thoughts on the subject, and those thoughts were expressed during consideration of a bill that did not affect the rights in motion pictures in any way (*see* note 78 & accompanying text, *supra*). Moreover, petitioners' claim that the home videotape recording issue was resolved in their favor in 1971 is belied by their continued warnings to VTR purchasers after that date that VTRs were "not to be used to record copyrighted works" (*see* note 16, *supra*; PX 166, 167, 170; R. 638-44).

who have copied respondents' works, virtually an impossible task.[84] Such a result would deprive respondents of a realistic remedy[85] and would be contrary to law.

Both courts below agreed that a contributory infringer is "one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another."[86] Under this established standard, a

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[84]Respondents brought this action against only the manufacturers, advertisers and sellers of VTRs because they — not individual VTR owners — are the ones profiting from unauthorized copying of respondents' motion pictures. Despite the contrary implications in petitioners' brief (P.B. 17 n. 20, 40-41), respondents have the absolute right to sue these contributory infringers alone without joining the primary infringers, *i.e.*, individual VTR owners, as defendants. *Costello Publishing Co. v. Rotelle*, 670 F.2d 1035, 1043 (D.C. Cir. 1981); *Wells v. Universal Pictures Co.*, 166 F.2d 690, 692 (2d Cir. 1948). *See Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911) ("Kalem") (contributory copyright infringer sued without joining direct infringers). There is no authority for petitioners' assertion (P.B. 44) that merely by publicly announcing their intention to excercise this right, respondents have granted a "license" to VTR owners for future VTR copying. Indeed, such a result would render meaningless respondents' right to sue only the contributory infringers. Petitioners' reliance on *Aro Mfg. Co., Inc. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964) is unavailing. In *Aro*, unlike here, plaintiff executed a written license agreement expressly permitting the alleged direct patent infringers to engage in the infringing activity.

[85]A similar consideration recently influenced the Seventh Circuit to reject arguments which would have absolved a supplier of infringing technology from copyright liability and thereby would have required the copyright owner to bring "a thousand or more copyright infringement suits" against the suppliers' customers. *WGN Continental Broadcasting Co. v. United Video, Inc.*, 685 F.2d 218, 221 (7th Cir. 1982).

[86]*Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) ("*Gershwin*"). *Accord*, 3 Nimmer, *supra*, §12.04[A], at 12-34. The contributory infringement doctrine in the copyright context is predicated on the "basic common law doctrine that one who knowingly participates in or furthers the tortious act is jointly and severally liable with the prime tort feasor." *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F.Supp. 399, 403 (S.D. N.Y. 1966) ("*Screen Gems I*") (Weinfeld, J.). *Accord, Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 327 F.Supp. 788, 791-92 (S.D. N.Y. 1971), *rev'd on other grounds*, 453 F.2d 552 (2d Cir. 1972). *See Kalem, supra*, 222 U.S. at 62-63 (seller who knows and expects that its product will be used to assist in copyright infringement "contribute[s] to the infringement . . . [and] is liable on principles recognized in every part of the law").

contributory infringer need not have actual knowledge of the infringing activity; constructive knowledge is sufficient.[87] Further, actual "inducement" of the infringing activity is not required; conduct which "furthers" or "materially contributes to" the infringing activity will suffice.[88] Nor is direct contact between the contributory infringer and the ultimate infringer necessary; indirect contact or participation in a chain of distribution resulting in the infringement is sufficient.[89]

Applying these principles to the instant case, the Court of Appeals correctly concluded that petitioners are liable as contributory copyright infringers.[90] First, the Court of Appeals ruled that petitioners had the requisite knowledge, noting that reproduction of copyrighted materials is the most

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[87]*E.g., Screen Gems I, supra*, 256 F.Supp. 399 (contributory defendant who "should have been aware" of infringing activities because of suspicious nature of primary infringers' conduct had sufficient constructive knowledge). *See Inwood Laboratories, Inc. v. Ives Laboratories Inc., supra*, 102 S.Ct. at 2188 (one who supplies a product to another with "reason to know" that the other is using the product in an infringing manner may be held liable as a contributory trademark infringer).

[88]*Kalem, supra*, 222 U.S. at 62-63; *Gershwin, supra*, 443 F.2d at 1162; *Screen Gems I, supra*, 256 F.Supp. at 403 (non-infringing advertisements which "further" the sale of infringing recordings sufficient to hold advertiser contributorily liable).

[89]*Kalem, supra*, 222 U.S. at 62 (producer who sells film to jobbers for resale to exhibitors contributorily liable for infringing performances by exhibitors). *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc., supra*, 102 S.Ct. at 2188 ("[e]ven if a manufacturer does not directly control others in the chain of distribution, it can be held responsible for their [trademark] infringing activities . . . ."); *Jerome H. Remick & Co. v. General Electric Co.*, 16 F.2d 829 (S.D. N.Y. 1926).

[90]Petitioners and many of their *amici* confuse the contributory infringement doctrine with the "vicarious liability" theory. Under the latter theory, liability is predicated on the defendants' right and ability to supervise, control or influence the direct infringer's activities coupled with a financial interest in those activities. Neither an ability to control nor a financial interest is necessary to find contributory infringement. *Gershwin, supra*, 443 F.2d at 1162. Thus, the district court's finding that petitioners could not control the use of VTRs in homes (P.A. 98; P.B. 12, 40) is irrelevant to the contributory infringement analysis.

conspicuous use of Betamax and is the use intended, expected and encouraged by petitioners (P.A. 27). This holding was mandated by petitioners' stipulation that Betamax is manufactured, advertised and sold for the primary purpose of reproducing television programming, as well as by the district court's finding that petitioners' advertisements "exhort" Betamax purchasers to record "favorite shows," "movies," "classic movies" and "novels for television" and to "build a library."[91] It was also required by petitioners' uncontroverted admissions, alluded to by the district court, that petitioners knew the main use of Betamax would be to record copyrighted material.[92] Given these clear admissions of actual knowledge and intent, petitioners far exceed the minimum requirements of constructive knowledge necessary to establish contributory infringement.[93]

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[91]P.A. 41-42; R. 1778-79; PX 87, 90-99, 454, 460, 461, 463, 466, 504-06, 511, 519, 544 (p. 4), 546 (pp. 2-3), 547 (p. 2), 548, 550, 554 (p. 8), 555-56, 1063, ¶5.

[92]P.A. 27, 90, 94; *see* note 9, *supra*. For example:

"Q. And therefore you knew that the majority of the uses of the Betamax to record television programs off-the-air would be to record copyrighted television programs off-the-air; isn't that also right?

A. You mean the majority use of the copying of programs off-the-air would be of copyrighted material?

Q. That's right.

A. Yes."

(Testimony of Harvey Schein, President, Sony Corp. of America ("Sonam"), R. 1821).

* * *

"Q. And you knew the motion pictures produced by [respondents] were copyrighted?

A. Yes."

* * *

"Q. Is it a fact, Mr. Gallagher, that you knew that the main use of the Betamax by consumers would be to record copyrighted television programs off-the-air?

A. Yes."

(Testimony of Daniel Gallagher, Vice President, Advertising, Sonam, R. 2078, 2094-95).

[93]*See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, *supra*, 102 S.Ct. at 2188 & n. 13; *id.*, at 2191-92 (White, J., concurring); *Kalem, supra*, 222 U.S. at 62-63.

Contrary to petitioners' assertion (P.B. 43), the district court did not dispute that petitioners knew and intended that Betamax would be used primarily to record copyrighted works, especially motion pictures such as those owned by respondents. The district court merely concluded that this knowledge was insufficient because in its view a finding of contributory infringement requires not only knowledge of the challenged activity but also knowledge that the activity violates copyright law. Acknowledging that petitioners knew of the challenged activity, the district court held that as a matter of law petitioners "could not" also have known that VTR copying is infringement because the issue is allegedly one of first impression (P.A. 94, 96, 97-98).

However, knowledge of the illegal status of the infringing activity is not a prerequisite of contributory copyright infringement, much less an absolute bar to liability whenever the legality issue is allegedly one of first impression (P.A. 26-27).[94] Accordingly, the Court of Appeals properly rejected as an erroneous interpretation of the law the district

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[94]No court has ever held that in addition to knowing of the activity itself, a contributory copyright infringer must also know that such activity is a copyright violation. To the contrary, courts have consistently rejected such an approach (*e.g., Famous Music Corp. v. Bay State Harness Horse Racing, etc.*, 554 F.2d 1213 (1st Cir. 1977); *BMI v. Marshall*, 201 U.S.P.Q. 30, 33 (E.D. Mich. 1978); *Chess Music, Inc. v. Sipe*, 442 F.Supp. 1184, 1185 (D. Minn. 1977); *Screen Gems I, supra*, 256 F.Supp. at 403), and for good reason. Arguably, no person sued as a contributory copyright infringer could ever "know" that an activity violates copyright law prior to a final adjudication as to the legality of such activity, particularly where, as here, the issue is allegedly one of first impression. If such knowledge were required, the doctrine of contributory infringement would become meaningless, since a defendant could virtually always evade liability by asserting his belief that the activity is non-infringing. As explained in *Famous Music, supra*, 554 F.2d at 1215, a defendant "could otherwise reap the benefits of countless violations . . . by merely claiming ignorance that any violation would take place." *Accord, Shapiro, Bernstein & Co., Inc. v. H.L. Green Co.*, 316 F.2d 304, 309 (2d Cir. 1963).

court's conclusion that petitioners' knowledge was insufficient.[95]

With respect to the second element of contributory infringement, there can be no doubt that the manufacture, advertisement, demonstration and sale of Betamax induce, cause, further and materially contribute to the unauthorized copying of copyrighted motion pictures. To repeat, petitioners stipulated that that is the primary use for which Betamax is designed and marketed. As the district court found, such copying is also the precise conduct that petitioners both encourage with their Betamax advertisements, brochures and operating instructions and contribute to through their sales and marketing activities (P.A. 41-42, 97).[96]

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[95]Even if knowledge of the illegal nature of the activity were required, the uncontroverted evidence overwhelmingly establishes such knowledge. From 1964 to 1975 petitioners consistently received legal advice concerning the illegality of off-the-air recording (R. 921-24, 960-61, 964-65, 2017, 2108, 2116-22). During this period, petitioners' advertisements, brochures and operating instructions warned purchasers of Sony's pre-Betamax VTRs that those VTRs could not be used to record copyrighted material (P.A. 42, 94; *see* note 16, *supra*). With the advent of Betamax, Sonam and DDBI constantly admonished each other that VTR copying, especially for library purposes, is illegal (R. 1852-53, 1923, 1961-62, 2017, 2108, 2116-18; PX 143, 648, 649, 716 (p. 8), 723 (p. 2)). Indeed, petitioner DDBI secured a written indemnity agreement from Sonam (P.A. 90) because, in the words of the agreement, "*our legal counsels were concerned about the risks of advertising a video recording product which can be used to record copyrighted material*" (PX 143) (emphasis added). Moreover, in September, 1976, two months prior to commencement of this action, respondents advised petitioners that their sale of VTRs infringes respondents' copyrights (R. 2723-25). Petitioners thus have always believed that VTR copying violates copyright law.

[96]Despite petitioners' contrary assertion (P.B. 12, 43), the district court did not find that petitioners did not induce or cause to be made VTR copies of respondents' motion pictures. It merely found that "[i]t is . . . *doubtful*" whether petitioners' admitted conduct met the "inducement" or "contribution" requirement because (a) the record did not show that any particular Betamax advertisement induced or caused the recording of any of the specific copies of the copyrighted motion pictures identified by title in the complaint, and (b) no petitioner (except petitioner Henry's Camera (P.A. 43) had any direct contact or

Given petitioners' undisputed activities, the Court of Appeals properly held that petitioners' conduct was overwhelmingly sufficient to satisfy the contribution requirement, reasoning that reproduction of copyrighted works "is the most conspicuous use of [Betamax]. That use is intended, expected, encouraged, and the source of the product's consumer appeal" (P.A. 27).[97] This holding is in complete harmony with this Court's decision in *Kalem Co. v.*

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involvement with the VTR owners who testified at trial (P.A. 93-94, 96-97) (emphasis added). However, inducing infringement of specifically identified works, as opposed to copyrighted works in general, is unnecessary to sustain copyright infringement liability. *See Shapiro, Bernstein Co., Inc. v. H.L. Green Co., supra*, 316 F.2d at 309; *Famous Music Corp. v. Bay State Harness Horse Racing, etc., supra*, 554 F.2d at 1215; *Chess Music, Inc. v. Sipe, supra*, 442 F.Supp. at 1185; *Elektra Records Co. v. Gem Elec. Distribs., Inc., supra*, 360 F.Supp. 821. Direct contact between the manufacturer/distributors and the ultimate infringers is also unnecessary. *See* note 89 & accompanying text. *supra*.

[97]*See* notes 9, 10 & 91, *supra*. Not only did petitioners blatantly foster VTR copying, but they affirmatively sought to counteract attempts to discourage such behavior. For example, when Sony learned that television broadcasters could broadcast a jamming signal to prevent VTR copying, Sony immediately studied and discovered a method to override the jamming signal (*see* note 4, *supra*). Moreover, despite the recommendations of their own lawyers and one network to place warnings on Betamax advertisements advising that VTR copying might be illegal, petitioners refused to do so because Sonam's president felt that such warnings might decrease Betamax sales (P.A. 42; R. 1818-19, 1970, 2023-26, 2108, 2116-18; PX 648, 649, 681 and 682).

Petitioners mislead the Court by stating that they clearly warned potential purchasers against Betamax copying (P.B. 3 n. 4, 40, 46). A purchaser receives no warning *before* he buys his Betamax (P.A. 42). In fact, the only "warning" he receives appears at the end of an 18-page booklet of operating instructions which is delivered with his Betamax in a sealed carton (P.A. 42, PX 98, p. 17). Moreover, the warning — which differs markedly from pre-Betamax warnings, P.A. 42; note 16, *supra* — is so vague that one Betamax owner who testified at trial thought it meant that "you couldn't use this machine to distribute and make a business out of taping people's movies and selling them" (R. 1579).

Harper Bros., supra, 222 U.S. 55. In *Kalem*, the Court held the seller of an unauthorized film version of a copyrighted story contributorily liable for subsequent infringing exhibitions of the film by others. The Court rejected the argument that the seller could not be held liable because it had not exhibited the film itself (*i.e.*, Kalem like Sony had not committed the final act of infringement) and specifically made clear that supplying the means to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability:

> "The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction [*i.e.*, exhibition] of the story. That was the most conspicuous use for which they could be used, and the one for which especially they were made." 222 U.S. at 62-63.

Accord, Elektra Records Co. v. Gem Electronic Distributors, Inc., supra, 360 F.Supp. 821 (retail store that furnished its customers with a duplicating machine to copy copyrighted sound recordings held liable for the infringing copies). The Court of Appeals' decision thus fully adheres to settled principles of contributory copyright infringement.

B. The Staple Article of Commerce Argument Does Not Immunize Petitioners From Contributory Copyright Infringement Liability.

In arguing that they are not liable as contributory infringers, petitioners — as did the district court — analogize VTRs to "staple articles of commerce" under the patent statute and rely on the staple article of commerce doctrine from patent law to avoid contributory copyright infringe-

ment liability.[98] This reliance on the staple article rationale is improper for several reasons. First, petitioners' analysis is based primarily on a perceived difficulty in fashioning appropriate relief rather than on any assertion that petitioners lack culpability under established contributory copyright infringement principles.[99] Second, analogies to this statutory patent doctrine are inappropriate in the copyright context. Third, even if such an analogy were proper, the doctrine would not shield petitioners from liability here.

Petitioners predicate their staple article analysis primarily on their view that to hold them liable for VTR copying would require an injunction which would unjustifiably inhibit possible non-infringing uses of VTRs. The district court engaged in an identical analysis, absolving petitioners of liability simply because the court assumed that it would be impossible to devise a remedy which would both protect respondents' works and at the same time permit possible non-infringing uses to continue.[100] This approach was manifestly improper. As the Court of Appeals noted, where, as here, liability is established under accepted legal principles, it is impermissible to deny relief merely because it may be

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[98]This doctrine is codified in 35 U.S.C. §271(c) as follows:

"(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

[99]Indeed, petitioners candidly admit that their sale of Betamax contributes to VTR copying. (Appellees' Ninth Circuit Brief and Cross-Appellants' Brief 70).

[100]The district court stated that a finding of liability would expand the theory of contributory infringement "arguably beyond judicial management," that under such a finding "[c]ommerce would indeed be hampered" and "an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy" (P.A. 97, 114; *see* P.B. 39-40).

difficult to fashion an appropriate remedy (P.A. 25-26, 28).[101]

Moreover, contrary to the district court's belief, appropriate relief *can* be devised to accommodate any noninfringing uses. One example is the continuing royalty suggested by the Court of Appeals (P.A. 28-29). A continuing royalty instead of a permanent injunction would permit noninfringing uses, if any, to continue unabated.[102] Such uses could also continue if petitioners were directed to devise a technological means to prevent VTR copying only of programs owned by respondents and others who object to such copying.[103] Accordingly, the district court could have resolved its dilemma without issuing a sweeping decree absolving petitioners of all liability.

The staple article of commerce theory is also inapposite because it is found in the *patent* statute — not the copyright statute — and represents a legislative accommodation of competing considerations arising from the unique nature of patents.[104] Analogies to this statutory defense are therefore inappropriate in a copyright case.

Even if such an analogy were proper, petitioners would nevertheless be liable here. First, because §271 must be read in its entirety (*see* note 64, *supra*), an analogy to

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[101]*Cf. Silver King Mines, Inc. v. Cohen*, 261 F.Supp. 666, 674-75 (D. Utah 1966).

[102]Similarly, an award of statutory damages (17 U.S.C. §504(c)) would require payment only for infringing recordings of respondents' copyrighted works, not recordings of unprotected works.

[103]*See* notes 4 & 97, *supra*.

[104]*Dawson Chem. Co. v. Rohm And Haas Co.*, 448 U.S. 176 (1980). Unlike copyrights, patented products and processes consist, as petitioners have noted, of many elements or components, the unique combination of which is protected by the patent (P.B. 41). As the very language of §271(c) demonstrates ("[w]hoever sells a component of a patented [product] . . . or a material . . . for use in practicing a patented process, *constituting a material part* of the invention . . . ."), the staple article defense is predicated on this unique characteristic of patents. *See, Jones v. RCA*, 131 F.Supp. 82, 83 (S.D. N.Y. 1955).

§271(c) also calls §271(b) into play. Section 271(b), which provides that "[w]hoever actively induces infringement of a patent shall be liable as an infringer," would proscribe petitioners' conduct even if §271(c) would not.

Section 271(b) forbids any conduct which "causes," "urges," "encourages" or "aids" another to infringe a patent.[105] Significantly, §271(b) contains no staple article of commerce limitation. Therefore, if the seller of an article causes, urges, encourages or aids another to use the article to infringe, the seller is liable for the infringement under §271(b) regardless of whether the article is a "staple" and regardless of whether it meets the "substantial non-infringing use" test of §271(c).[106] The reason for this rule is clear: while there may be a societal interest in permitting the sale of articles capable of a variety of non-infringing uses, there is obviously no legitimate social interest in permitting a seller of those articles to encourage their use in an infringement. Since petitioners' advertisements, brochures and instruction manuals unquestionably cause, urge, encourage and aid VTR purchasers to infringe respondents' copyrights (*see* notes 9, 10, 91, 96 & accompanying text, *supra*),

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[105]*Fromberg, Inc. v. Thornhill*, 315 F.2d 407, 411 (5th Cir. 1963) ("inducement has connotation of active steps knowingly taken — knowingly at least in the sense of purposeful, intentional, as distinguished from accidental or inadvertent. But with that qualifying approach, the term is as broad as the range of actions by which one in fact causes, or urges, or encourages or aids another to infringe a patent"). *Accord, Ingersoll-Rand Co. v. Rockwell Int'l. Corp.*, 420 F.Supp. 277, 281 (S.D. Fla. 1976); *Aluminum Extrusion Co. v. Saule Steel Co.*, 260 F.Supp. 221, 224 (C.D. Cal. 1966).

[106]*Rohm And Haas Co. v. Dawson Chem. Co.*, 599 F.2d 685, 700 (5th Cir. 1979), *aff'd*, 448 U.S. 176 (1980) (the seller of a staple article is liable for infringements by his customers if he "actively induc[es]infringement (*as by advertising or giving detailed instructions for* practicing the invention with his products — conduct prohibited by paragraph (b))" (emphasis added); *Fromberg, Inc. v. Thornhill, supra*, 315 F.2d at 410-12; *see SPEE-FLO Mfg. Corp. v. Gray Co., Inc.*, 255 F.Supp. 618, 620 (S.D. Tex. 1964); *Weyerhaeuser Timber Co. v. Bostitch, Inc.*, 178 F.Supp. 757, 760 (D. R.I. 1959).

petitioners are liable by analogy to §271(b) notwithstanding their claim that VTRs are staple articles of commerce.

Second, even if §271(b) were disregarded, the requirements of §271(c) would not be satisfied in this case. Under subsection (c) a seller of a staple article can avoid contributory infringement liability only if the article is "suitable for *substantial* non-infringing use." 35 U.S.C. §271(c) (emphasis added). Importantly, the district court refused to find that Betamax meets the substantial non-infringing use requirement (P.A. 97, 114). The district court found only that VTRs are capable of *some potential* non-infringing uses (P.A. 97, 106-7, 114).[107] The Court of Appeals likewise concluded that the record did not establish that VTRs are capable of substantial non-infringing uses (P.A. 26).

The refusal of both courts below to find VTRs suitable for substantial non-infringing uses was entirely proper. To meet the substantiality test, proof of minor non-infringing uses will not suffice, nor will a showing of a mere possibility of such uses.[108] Rather, petitioners had the burden of proving that any non-infringing uses were both actual (not merely possible) and substantial.[109] Petitioners did not satisfy this test.

As petitioners concede, the primary function of VTRs is to reproduce copyrighted television programming. Petitioners' claim (P.B. 4, 29, 40) that the vast majority of this

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[107] Petitioners' and supporting *amici's* repeated assertions that the district court found substantial non-infringing uses (*e.g.*, P.B. 40, 43 n. 53) are false. In fact, the district court determined to apply the staple article rationale regardless of the substantiality of such uses (P.A. 97) ("[w]hether or not . . . Betamax is capable of 'substantial' noninfringing use. . . .").

[108] *United States Gypsum Co. v. National Gypsum Co.*, 440 F.2d 510, 516 (7th Cir. 1971), *cert. denied*, 403 U.S. 923; *Shumaker v. Gem Mfg. Co.*, 311 F.2d 273, 276 (7th Cir. 1962); *Reynolds Metals Co. v. Aluminum Co. of America*, 457 F.Supp. 482, 509-10 (N.D. Ind. 1978).

[109] *Fromberg, Inc. v. Thornhill, supra*, 315 F.2d at 415; *Reynolds Metals Co. v. Aluminum Co. of America, supra*, 457 F.Supp. at 509-10.

programming is available for non-infringing reproduction lacks any legal or factual support. First, virtually all of this programming is protected by federal or state law from unconsented copying, including VTR copying.[110] Accordingly, VTRs are simply incapable of substantial non-infringing uses.

Petitioners attempt to avoid this inescapable conclusion by arguing that some alleged program owners testified that they did not object to VTR copying and that this somehow renders VTRs suitable for substantial non-infringing use (P.B. 40-43). However, the testimony of the few witnesses upon which petitioners rely is both uniformly inconclusive[111] and legally insufficient. Indeed, even in the rare cases where

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[110]All television programs are protected by copyright if, as is usually the case, they are filmed (*i.e.*, "fixed") prior to telecast. 1976 House Report 52. Even live events such as concerts and live news coverage are protected by copyright if they are fixed simultaneously with the live broadcast. *Id.* And, live programs not simultaneously fixed are protected by state law. *Id.*; Cal. Civ. Code §980, *as amended*, A.B. No. 3483, 1981-82 Reg. Sess., ch. 574 (Aug. 25, 1982), 1982 Cal. Legis. Serv. p. 3508 (West); *CBS, Inc. v. Documentaries Unltd., Inc.*, 248 N.Y.S.2d 809, 42 Misc.2d 723 (1964); *see Zacchini, supra*, 433 U.S. 562. Thus, the Court of Appeals' conclusion that virtually all television programming is protected from unconsented copying (P.A. 26) is inescapably correct, notwithstanding petitioners' criticism of the authority relied upon by the Court (P.B. 43 n. 53).

Nor does the fact that a few television stations may not be able to meet the deposit requirements necessary for copyright registration of some of their locally produced programs render these programs available for unconsented VTR copying, as petitioners assert (P.B. 9). Statutory copyright protection subsists continuously from the moment a work is first fixed in a tangible medium of expression, whether or not the work is ever registered. 17 U.S.C. §302(a); 2 Nimmer, *supra*, §7.16[A][1], at 7-111. Registration and deposit are merely prerequisites to filing an infringement action (17 U.S.C. §411(a)). As the very language of the statute makes clear, "such registration is not a condition of copyright protection." 17 U.S.C. §408(a); *see* 2 Nimmer, *supra*, §7.16[A][1], at 7-111, 7-129-30. Thus, VTR copying is no less a copyright violation merely because the program copied has not been registered.

[111]Some of the deficiencies in this testimony are described in note 116, *infra*. Space considerations, however, preclude a thorough analysis of this testimony in this brief. For such an analysis, see Plaintiffs' Opening Post-Trial Memorandum, C.R. 28/88, pp. 79-107.

program owners might consent to VTR copying (*see* note 116, *infra*), under basic precepts of copyright law reproduction of these programs will nevertheless usually constitute infringement unless the consent of many others is also obtained.[112] For example, virtually all programs contain copyrighted music, *see Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), and are normally based on underlying written works (*e.g.*, books, plays and television scripts) which are protected by a copyright distinct from the copyright in the broadcast television program. *See* 17 U.S.C. §§102, 103; 1976 House Report 57-58; 1 Nimmer, *supra*, §3.04, at 3-12 - 3-14. Without the consent of the owners of these musical and underlying written works, the television programs incorporating this material cannot be legally copied.[113]

Second, there is no consent by anyone to the vast majority of VTR copying. Petitioners' own survey shows that over 80% of all Betamax recordings consists of protected entertainment programs, nearly all of which are owned by respondents and supporting *amici*, all of whom object to such copying (*see* note 1, *supra*).[114] This same survey shows that

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[112]Despite petitioners' contrary assertion (P.B. 8), NBC does not consent to VTR copying. Indeed, NBC broadcasts a prohibition against off-the-air recording of its programs (R. 3004-06, 3159; PX 1070). In any event, NBC obviously has no power to consent to the copying of programs which are owned by others (such as respondents) and merely licensed to NBC for television exhibition (*see, e.g.*, PX 890, ¶21; *United States v. NBC*, 449 F.Supp. 1127, 1134-36 (C.D. Cal. 1978).

[113]*Filmvideo Releasing Corp. v. Hastings*, 668 F.2d 91, 92-93 (2d Cir. 1981); *Russell v. Price*, 612 F.2d 1123, 1128 (9th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980). For example, the testimony of the owner of the *Spider Man* series that he did not object to VTR copying does not render that copying legal. There is no evidence that the owners of the copyrighted music contained in the series or the owners of the copyrights in the underlying *Spider Man* comic books (R. 2932-34; P.B. 9) ever consented to such copying. Similarly, petitioners did not present such evidence with respect to the works allegedly owned by their other witnesses.

[114]*See* DX OT, Tables 20, 40 and Questionnaire 14, 26.

less than 9% of all recordings consists of religious (0%), educational (1.6%), and sports (7.3%) programs — the type of material purportedly owned by most of the limited number of witnesses who testified that they did not object to VTR copying.[115] Even as to this 9%, petitioners did not establish that the copied material is owned by program owners who do not object to VTR copying.[116]

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[115](DX OT, Tables 20, 40). Petitioners' statements that 49% of Betamax owners record sports, 10% record religious and 63% record educational programs are gross mischaracterizations of the evidence (P.B. 7). The survey on which these statements are based asked Betamax owners merely "*Have you ever* used the Betamax to record" such programs (DX OT, Questionnaire 9). Affirmative answers to this question allow only the inference that the respondents recorded sports, religious and educational programs *once*, not that they make a regular practice of doing so.

[116]This showing was necessary because so few owners of such protected material consent to VTR copying. Petitioners presented testimony from only a few educational and religious program owners (R. 2564-87, 2593-2640, 2823-44, 2863-2902). But they clearly do not speak for all owners of educational and religious programs. Indeed, both in this Court and below many major producers and distributors of educational and religious programs have registered strong objection to VTR copying (R. 3173-3200; Brief Amicus Curiae of Creators and Distributors of Programs in Support of Respondents; *see Encyclopaedia Britannica I, supra*, 447 F.Supp. 243; *Encyclopaedia Britannica II, supra*, 542 F.Supp. 1156) (objection by 3 large educational program producers to VTR copying for educational purposes).

Similarly, petitioners presented testimony from representatives of the commissioners of five sports leagues. However, none of these witnesses purported to speak either for the leagues as a whole or for individual team members (R. 2460-63, 2468, 2491-94, 2511-12, 2517, 2520-21, 2526-28, 2532, 2537-38, 2545, 2550, 2554-56, 2561-62). Moreover, each witness' testimony was addressed only to the copying of network broadcasts, not the thousands of local station broadcasts owned by individual teams. Even many network broadcasts may not be copied without permission of individual teams (R. 2509). No individual team has expressed its consent to VTR copying (R. 2454-55, 2468, 2491-93). Indeed, three teams (New York Mets, Boston Red Sox and Boston Bruins) recently indicated that they object to unauthorized viewing of their televised games. *See Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 534 F.Supp. 533 (N.D. N.Y. 1982) ("*Eastern Microwave*"); *New Boston Television, supra*, 2 Copyrt. L. Rep. (CCH) ¶25,293.

It should also be noted that all of the testimony upon which petitioners rely was given four to five years ago when the VTR industry was in its infancy. There is no indication that the witnesses who testified continue to adhere to their previously expressed views. *See Eastern Microwave, supra; New Boston Television, Inc., supra.*

Thus, petitioners' evidence does not support, and indeed refutes, their claim that non-infringing uses of Betamax are both actual and substantial.[117] Since both courts below refused to find on this evidence that VTRs are suitable for substantial non-infringing uses, and since such a finding is required to invoke the staple article of commerce argument, petitioners' reliance on the district court's conclusion that VTRs are theoretically capable of *some* non-infringing uses is unavailing.

Because VTRs are advertised and sold for the primary purpose of infringement, petitioners' additional claim that imposition of liability in this case would be tantamount to imposing liability on the suppliers of cameras, typewriters and Xerox machines is spurious (P.B. 43). Unlike cameras, typewriters and Xerox machines, whose primary market is derived from non-infringing uses, there would be little, if any, market for VTRs if they could not be used for infringing purposes (*see* notes 114, 115 & accompanying text, *supra*). Petitioners' unwillingness to devise a technological means of preventing copying of copyrighted works makes plain that without the ability to make unconsented copies of the copyrighted motion pictures owned by respondents and *amici*, there would be little if any market for VTRs. The Court of Appeals correctly held that petitioners should not be allowed to build an industry based on this unconsented copying merely because VTRs may also be capable of some non-infringing uses (P.A. 25-29).[118]

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[117]Contrary to the contentions of petitioners' *amici*, the use of VTRs to make home movies with a video camera and to play back licensed, pre-recorded videocassettes is not relevant to the issue of possible non-infringing uses. Those uses do not involve Betamax' off-the-air recording capability and can be accomplished with machines (not challenged in this action) that cannot record off-the-air (*see* note 9, *supra*).

[118]*See Ortho-O-Vision, Inc. v. Home Box Office*, 474 F.Supp. 672, 686 n. 14 (S.D. N.Y. 1979). *Accord, United States v. Loew's, Inc.*, *supra*, 371 U.S. at 53.

III.

IT WOULD BE PREMATURE FOR THIS COURT TO DETERMINE AT THIS TIME WHETHER A CONTINUING ROYALTY IS AN APPROPRIATE REMEDY. IN ANY EVENT THE DISTRICT COURT CLEARLY HAS THE POWER TO ORDER SUCH A REMEDY.

The question whether the district court, after remand, may order the payment of a continuing royalty as a condition to denying a permanent injunction is premature. The Court of Appeals did not direct the district court to enter such a remedy. Rather, recognizing the difficulties posed by the remedy question, the Court of Appeals simply remanded the case for the fashioning of an appropriate remedy, noting that the district court might consider whether a continuing royalty would be "an acceptable resolution in this context" (P.A. 28-29). Since the district court has not yet considered the remedy question, any pronouncement by this Court concerning the issue would be wholly advisory and without the benefit of a factual record.

Not only is the remedy issue premature, but petitioners' analysis of the issue is defective. Petitioners assert that there is no statutory or decisional authority for imposition of a continuing royalty in lieu of a permanent injunction (P.B. 45). To the contrary, 17 U.S.C. §502(a) authorizes the district court to issue "final injunctions on such terms as it may deem reasonable." This is simply "a reaffirmation of the usual power of courts to grant injunctions . . . ." *Register's 1965 Supplementary Report* 132. Under this power, courts have the unquestioned authority in appropriate cases to withhold an injunction against unauthorized use of property on the condition that the defendant adequately compensate the plaintiff for continued use of the property.[119] A continuing royalty in lieu of a permanent injunction would accomplish precisely this result. That the district court has

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[119] *City of Harrisonville, Mo. v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 339-40 (1933).

power under the Copyright Act to impose a continuing royalty pursuant to its general equitable powers is further confirmed by 17 U.S.C. §405(b) which expressly authorizes courts, in cases where copyright notice has been omitted from the infringed work, to permit the infringing activity to continue "on condition that the copyright owner be paid a reasonable license fee." House Report 148.

It is evident from the foregoing that a continuing royalty is authorized by law. Moreover, such a remedy could accommodate the interests of all parties and the public by ensuring fair compensation to respondents for the use of their works while avoiding a total ban against future VTR sales. For this latter reason alone, this Court should not decide whether such a remedy is appropriate until the district court has had an opportunity to evaluate the ramifications of a continuing royalty and to develop a full record upon which an informed review by this Court can be based.[120]

IV.

THE COURT OF APPEALS' DECISION FULLY COMPORTS WITH THE "CLEARLY ERRONEOUS" STANDARD OF APPELLATE REVIEW.

Petitioners accuse the Court of Appeals of violating the clearly erroneous standard of review (Fed. Rule Civ. Proc. 52(a)) by substituting its own findings of fact for those of the district court without holding the district court's findings clearly erroneous. The argument lacks merit.

It is settled that the clearly erroneous limitation does not apply to review of legal conclusions drawn by a district

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[120]The sincerity of petitioners' contrary position is questionable since Sonam's president suggested such a remedy early in this litigation (Depo. of Harvey L. Schein, May 12, 1977, pp. 375-76, App. C hereto). Petitioners' resistance to a compulsory royalty is also difficult to understand in view of their continued expressions of concern over the harshness of the alternate equitable remedy of an injunction against VTR sales (*e.g.*, P.B. 39-40).

court from facts found at trial, and that a reviewing court is therefore free to make an independent determination as to those legal conclusions.[121] Consistent with this rule the Court of Appeals merely held that the facts found by the district court did not support the legal conclusions which it drew therefrom, and that these findings and petitioners' admissions required a holding of liability on both the fair use and contributory infringement issues as a matter of law. *See* discussion at §§I.A., I.B. & II, *supra*.[122] In so doing,

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[121]*United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961); *United States v. Grayson County State Bank*, 656 F.2d 1070, 1075 (5th Cir. 1981); *United States Fidelity etc. Co. v. Royal Nat'l. Bank*, 545 F.2d 1330, 1333 (2d Cir. 1976); *see Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, *supra*, 102 S.Ct. at 2189 n. 15 (clearly erroneous limitation inapplicable where, as here, the district court's findings are based on an erroneous view of the law).

[122]On the fair use issue, the Court of Appeals held that the district court's findings that VTR copies involve no independent creation, usually involve copying the entire copyrighted work, serve the same purpose as the original, have economic value which petitioners — rather than respondents — currently receive from VTR owners, require respondents to compete with such copies in the marketplace and involve frequent deletion of commercial messages from the television broadcasts thereof necessitate rejection of the fair use defense as a matter of law. The Court of Appeals further held that the district court's findings that VTR copies are made (1) in the home (2) from the public airwaves (3) for non-commercial purposes (4) allegedly to increase access to respondents' broadcast copyrighted works and that (5) respondents did not prove any damages to date nor a "probability" of such damages in the future are insufficient as a matter of law to qualify such copies as fair use. (*See* §§I.A. & I.B, *supra*).

On the issue of contributory infringement, the Court of Appeals held that the district court's findings, and the stipulations and admissions by petitioners, that Betamax is manufactured, advertised and sold for the primary purpose of reproducing television programs, that petitioners know that such reproductions include copyrighted works, including works produced by respondents, that petitioners' advertisements exhort such copying and that Betamax contributes to the making of such reproductions establish contributory infringement as a matter of law.

The Court of Appeals further held that the district court's finding that petitioners "could not" know that VTR copies violate copyright law does not preclude contributory infringement liability because knowledge of the legal consequences of the infringing activity is unnecessary. The Court of Appeals also discounted the finding that petitioners' advertisements did not induce copying of the specific titles alleged in the complaint because neither inducement nor the singling out of specific

(footnote continued on following page)

PTCJ

the Court of Appeals neither substituted its own findings for those of the district court nor made new findings based on disputed evidence. Thus, the decision below comports with Rule 52 in all respects.

V.
CONCLUSION.

For all of the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

STEPHEN A. KROFT,
(Counsel of Record),
JOHN G. DAVIES,
SONDRA E. BERCHIN,
Attorneys for Respondents,
Universal City Studios, Inc. and
Walt Disney Productions.

Of Counsel:
ROSENFELD, MEYER & SUSMAN.

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titles for copying is a necessary element of contributory infringement. Finally, the Court of Appeals ruled that the district court's findings that VTRs are staple articles of commerce capable only of *some* non-infringing uses cannot as a matter of law preclude contributory infringement liability because the staple article doctrine requires a finding — which the district court refused to make — that VTRs are suitable for *substantial* non-infringing use and because application of the doctrine here improperly absolved petitioners of liability merely because the district court assumed that fashioning a remedy would be difficult. (*See* §II, *supra*).

APPENDIX A.

The following Table sets forth in numerical order each exhibit referred to in Respondents' Brief. The page numbers in the Reporter's Transcript ("R.") at which each exhibit was identified and admitted are also set forth pursuant to Supr. Ct. Rule 34.5.

Exhibit No.	Identified	Admitted
87	R. 684	R. 684
90	577	579, 713
91	577	579, 713
92	577	579, 713
93	710	713
94	710	713
95	710	713
96	710	713
97	710	713
98	710	713
99	710	713
110	1925	1925
111	1925	1925
113	1925	1925
114	1925	1925
124	1297	1299
143	1869	1869
147	670	671
148	670	671
149	670	671
150	1944	1944
151	672	673
152	672	673
155	674	675
156	674	676
157	678	679

Exhibit No.	Identified	Admitted
158	R. 926	R. 926
159	926	926
160	926	926
161	926	926
162	926	926
163	926	926
164	926	926
165	926	926
166	926	926
167	644	644
168	644	644
169	644	644
170	644	644
228	670	670
252	670	670
253	670	670
326	678	679
328	674	677
329	674	677
330	674	677
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449	645-46	646
452	642	642
453	642	642
454	1937-38	1938
460	1937-38	1938
461	1937-38	1938
463	1937-38	1938
466	597	616
504	1932-33	1933
505	631	635
506	1932-33	1933
511	1932-33	1933
519	1942-43	1943

Exhibit No.	Identified	Admitted
544	R. 1847	R. 1847
546	1847	1847
547	685-86	686
548	685-86	686
550	685-86	686
552	685-86	686
554	685-86	686
555	682	684
556	682	684
559	1814	1819
648	1929	1929
649	1929	1929
681	1814	1819
682	1814	1819
716	1854	1854
717	1830	1831
723	1930	1931
730	1082	1120
890	1165	1166
986	973	974
987	973	974
1063	1771-80	1780
1068	2945	2945
1070	3006	3006
OS	2650	2680
OT	2308	2309

APPENDIX B.

"We do not think our copyrighted motion pictures in whole or in part, should be physically copied *in homes*, in libraries, for private research, entertainment, or otherwise, without our permission, if new technologies were to permit the easy duplication of our works by taking the same off a television screen onto a tape or wire recorder, or by duplicating a rented film, tape, or wire."

* * *

"We have no present comment as to photocopying by libraries, other than to be sure that any such right does not extend to permit our motion picture films to be duplicated in whole or in part *for any purpose*."

Statement of MPAA, March 2, 1962, *in* Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights 345, 351, 88th Cong., 1st Sess. (House Comm. Reprint) (1963) (emphasis added).

APPENDIX C.

"Q. Now, Mr. Schein, you attended the International Tape Association Seminar or Convention in Hilton Head, South Carolina last month, did you not?

A. That's correct.

Q. And at that convention you made the statement in substance that Sonam would not oppose a law or a judicial decision which required the sellers of videotape recording machines with off-the-air recording capabilities to pay a—I don't know if it was a tax, but some kind of a fee, some amount of money to the owners of television, copyrighted television shows.

Do you remember saying that?

A. In substance.

Q. Is one of the reasons that you made that statement because you believe that the payment of a fee such as that would in part reimburse the owners of the copyrighted television programs for revenue that they would lose because of off-the-air recording of their programs?

MR. DOSKOW: I object to that question. It's totally irrelevant. His reasons for saying that he would advocate a particular type of legislative program has no bearing on this case.

THE WITNESS: Not advocate. I believe I said I would not object to it."

(Deposition of Harvey L. Schein, May 12, 1977, pp. 375-76).

Petitioner's Reply Brief

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No. 81-1687

IN THE

Supreme Court of the United States

October Term, 1982

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR THE PETITIONERS.

DEAN C. DUNLAVEY,
(Counsel of Record),
DONALD E. SLOAN,
GIBSON, DUNN & CRUTCHER,
Crocker Center,
333 S. Grand Avenue,
Los Angeles, Calif. 90071,
(213) 229-7000,
Attorneys for Petitioners Sony Corporation of America, et al.

Of Counsel:
MARSHALL RUTTER.

December 3, 1982

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QUESTIONS PRESENTED.

1. Is reception at home by videotape recorder (followed only by private viewing at home) of free off-the-air television programming an infringement of statutory copyright on such programming?

2. If the answer to Question No. 1 is "Yes", does the manufacture, sale and/or advertisement of a home videotape recorder *per se* constitute contributory infringement whenever that videotape recorder is used for such reception at home?

3. Is "fair use" of a copyrighted work (17 U.S.C. § 107) limited to a "productive use", and precluded from being an "intrinsic use"?

4. Can a federal court impose a compulsory license on a copyright owner, and impose continuing royalties on an infringer, as a remedy for statutory copyright infringement?

5. By totally ignoring the findings of fact of the district court, and by holding retailers liable for contributory infringement when they never were alleged to have such liability, did the Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

The parties to the proceedings below are UNIVERSAL CITY STUDIOS, INC., a corporation ("Universal"), and WALT DISNEY PRODUCTIONS, a corporation ("Disney"), Respondents herein, Plaintiffs-Appellants below, v. SONY CORPORATION OF AMERICA, a corporation ("Sonam") — distributor in America of a home videotape recorder called Betamax, SONY CORPORATION, a corporation ("Sony") — manufacturer of Betamax; CARTER HAWLEY HALE STORES, INC., a corporation, ASSOCIATED DRY GOODS CORPORATION, a corporation, FEDERATED DEPARTMENT STORES, INC., a corporation, HENRY'S CAMERA CORPORATION, a corporation — retailers of Betamax; DOYLE DANE BERNBACH, INC., a corporation ("DDBI") — Sonam's former national advertising agency for Betamax; and WILLIAM GRIFFITHS, an individual; Petitioners herein (except Griffiths, who has no interest in the outcome of this petition or this case), Defendants-Appellees below.

A listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of each corporate petitioner has been included in the Petition; it currently is still accurate (Sup. Ct. Rule 28.1).

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR THE PETITIONERS.

REPLY TO "COUNTERSTATEMENT OF QUESTIONS PRESENTED" AND TO "COUNTERSTATEMENT OF THE CASE".

This Reply Brief for the Petitioners is necessitated by the "Counterstatement of Questions Presented" in Brief for Respondents, which changes (in an argumentative fashion) the substance of the questions upon which certiorari has been granted — contrary to Sup. Ct. Rule 34.2;[1] and by respondents' ensuing "Counterstatement of the Case", which consists primarily of material factual misstatements unsupported by, and contrary to, the findings of fact and the evidence. Correction of respondents' overreaching requires a reply incorporating some related background information which the Court otherwise could have, and should have, been spared.

I.
THE ISSUE OF CONTRIBUTORY INFRINGEMENT.[2]

Petitioners (Pet. Br. 39) and respondents (Resp. Br. 39) agree that this is the most important issue of the case — because it will determine whether home videotape recorders continue to be made available to the American public. As presented by the petition for certiorari, question No. 2 is whether the manufacture, sale and/or advertisement of a home videotape recorder ("VTR") *per se* (*e.g.*, without

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[1]This reply brief will not address respondents' counterstated questions 3 and 4, which change the petition's questions 4 and 5 — the lack of authority for a federal court to impose compulsory licenses and compulsory royalties as relief for copyright infringement is so clear, and the departure by the Court of Appeals from the accepted and usual course of judicial proceedings was so blatant in its total disregard of the district court's findings of fact, that respondents' "changes" are an implicit admission that respondents have no position under the petition's questions 4 and 5.

[2]Respondents concede that no contention of direct infringement, vicarious liability or unfair competition on the part of petitioners is before this Court (Resp. Br. 9 n. 22, 41 n. 90).

inducement to record any particular work) constitutes contributory infringement in those instances (if any there be) where the VTR is used for such home reception of free off-the-air TV programming as may constitute direct copyright infringement. As substantively and argumentatively warped by respondents, the counterstated question No. 2 incorporates a misleading paraphrase of the Court of Appeals' opinion (Pet. App. 19, 27) that the VTR suppliers "intend[ed], expect[ed] and encourag[ed] that [the VTRs] be used primarily to copy entire copyrighted motion pictures" — with an ensuing false counterstatement of the case to the effect that the bulk of those motion pictures were the works of respondents.

Role of the Home VTR in Free Off-The-Air TV in the United States.

Radio broadcasts were made available to the American public beginning in 1920 by the electronics industry for the purpose of creating a market for home radio receivers. Within a few years, the expense of broadcasting was taken over from the receiver manufacturers by opportunistic advertisers — the concept of varied broadcast programming to get the public's attention (educational, informational, religious, sports, news, entertainment, etc.), plus as many advertising messages from sponsors as could be interspersed without losing that attention, thus is almost as old as broadcasting itself. The electronic industry's efforts to technically enhance public radio broadcasting and reception have been ongoing to this day (*e.g.*, transistorization, portability, FM, stereophonic FM, hi-fi component reception, off-the-air audio tape recorder reception, digital transmission, etc.).

Television broadcasting for public reception was introduced in the United States in 1941 by the electronics industry, and expanded rapidly beginning in 1948 after World

War II. Like radio, commercial TV broadcasting was sponsored by advertising virtually from the outset (conversely, most foreign countries sponsor broadcasting by a tax on receivers). A belief by many that some free off-the-air TV programming should have a quality different from what advertisers would provide led to the origin in 1953 of national educational television stations sponsored by government and by the public, today called the Public Broadcasting Service ("PBS"). Ongoing technical progress provided by the electronics industry for enhancing free TV broadcasting and reception has included transistorization, color, off-the-air VTR reception, stereophonic sound, component reception, digital transmission, etc. Of all the media in America, television probably contributes most to the existence of a well informed populace and electorate — the goal of the First Amendment (see *amici* brief of Virginia Citizens' Consumer Council, Inc., et al., pp. 4-17).

America today has free off-the-air TV not because of respondents and their *amici* studios, but in spite of them. For many years the movie studios resisted free off-the-air TV as a threat to theatre. Not until the middle 1950's did any studio originate programming for free TV or make other than pre-1948 movies available to free TV. Not until the middle 1960's, and then only in their own self interest, did the studios commence to supply better and more recent theatrical movies to free TV, or to make movies for television.[3]

Respondents unconscionably dispute (Resp. Br. 5 n. 10) the fact that VTRs have been on sale and sold for free off-the-air TV home recording continuously since the middle

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[3] "The motion picture industry, scared to death of television, kept all but its oldest and sleaziest feature films locked away in the vaults." Head and Sterling, *Broadcasting in America*, 4th ed. 1982, pp. 197, 201, 203-4; Greenfield, *Television: The First Fifty Years*, 1977.

1960's. The home VTR (black and white "CV" series) was first made available in the United States in 1965 (Pet. App. 40). It was heralded to the public in general (*e.g.*, see Appendix A hereto, *The New York Times*, June 9, 1965, DX V; see also DX L-AL, AV-EN, JC, JD; R. 636-7) and was demonstrated to respondents and to the entertainment industry in particular (DX A-J, JH, JI).[4] The first color home VTR ("AV" series) was made available in the United States in 1969-70, also with national media fanfare (*e.g.*, see Appendix B hereto, *Life* magazine, October 16, 1970), and still is being sold (R. 636, 638, 753-4). The first cassette home VTR ("U-Matic" series) was made available in the United States in 1972 (R. 639). The Betamax model home VTR was introduced in 1975.

As respondents well know, petitioners' *caveat* to buyers "This videotape recorder is not to be used to record copyrighted material" (Resp. Br. 6 n. 16) goes back to the early days of the home VTR. Since the whole idea of VTR is time-shift viewing, and since it is obvious that some sort of interim "record" or "copy" of the broadcast therefore must exist to provide the playback viewing, the copyright issue raised by the home VTR was self-evident at the outset. However, as the years went by, concerns over the copyright issue as regards home VTR reception were made to appear groundless.

First, following the advent and publicizing of the home VTR in 1965, and until late 1976, neither respondents, their *amici* nor anyone else raised any copyright infringement objection. To the contrary, for example, Universal's ex-

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[4]Each defendants' and plaintiffs' trial exhibit referred to herein ("DX" and "PX") is listed in order in Appendix E hereto, together with the pages in the record at which such exhibit was identified and was admitted into evidence. Sup. Ct. Rule 34.5.

ecutive Adams wrote Sony's president in 1969 that the home VTR was "an exciting breakthrough for both the motion picture industry and television industry. May I wish you success" (DX EX);[5] and as late as December 1975 Universal's executive Schreiber wrote a Sony distributor "certainly there is a market for 'Betamax'. I hope that it contributes importantly to your earnings" (DX KA).

Second, in 1971, Congress was passing the Sound Recordings Act ("1971 Amendment") with a legislative history embodying statements such as by the president of the Record Industry Association of America, Inc. that as to home off-the-air audio recording "no such enforcement is possible, and certainly none is intended"; by the Chairman of the House Judiciary Committee that home recording "off a program which comes through the air on the radio or television . . . is considered both presently and under the proposed law to be fair use"; and by the 1971 House Report that "it is not the intention of the Committee to restrain the home recording, from broadcasts . . . where the home recording is for private use" (Pet. Br. 32-39). Notwithstanding Johnny-come-lately specious arguments that home audio recording constitutes infringement under this 1971 Amendment and under the Copyright Revision Act of 1976, even respondents and their counsel (like petitioners) believe it does not (see Appendix C hereto).

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[5]Respondents had the effrontery to tell the district court in a pre-trial brief that the only Sony home VTR prior to the U-Matic series "was sold in such limited quantities that plaintiffs never knew of its existence" (C.R. 10/224, pp. 71, 76). However, petitioners' persistent discovery eventually forced respondents' production of internal documents going back to 1965 — documents which not only established respondents' knowledge of the CV and AV series and of the fact that "Any TV programs (including filmed shows) may be recorded" and which made no suggestion of copyright infringement, but which also correctly prophesied that VTRs "will create demand for pre-taped non-broadcast programs" (DX E, H, I).

Respondents knowingly misstate that "petitioners . . . have always believed that home video recording violates the Copyright Act" (Resp. Br. 6, 6 n. 14, 44 n. 95). By the time Betamax was introduced in 1975, Sonam's president "did not believe that people recording in their home would violate the copyright law" (R. 2714); and the *caveat* to each Betamax purchaser had been modified to: "CAUTION Television programs . . . may be copyrighted. *Unauthorized* recording of such material *may be contrary* to the provisions of the copyright laws." As the district court noted, after reference to events between 1965-75, "opinions changed" (Pet. App. 94). In fact, when Universal filed this action in November 1976, it tried to induce the other major movie studios to join with it — but got turn-downs from all but Disney (see Appendix D hereto). Conversely, those same studios and other copyright owners have not hesitated to sue VTR users who exceeded home usage.[6] The only logical inference is that these studios and copyright owners either consent to home VTR reception or, like petitioners, do not consider it to be infringement.

Respondents knowingly misrepresent petitioners' supposed knowledge and defeat of, and objection to introduction into evidence of, a technological system which would prevent off-the-air recording of respondents' programming while permitting recording of all other programs (Resp. Br. 2 n. 4, 45 n. 97). VTRs and television sets both are free off-the-air TV receivers, each employing a tuner. What one

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[6]*E.g., American Broadcasting Companies, Inc. v. Le Disco, Inc.* (D. Mass.-No. 80-2724 Ma) — *General Hospital* free off-the-air TV recordings used for customer entertainment in a discotheque; *Universal City Studios, Inc., Metro-Goldwyn-Mayer, Inc., Paramount Pictures Corporation, Walt Disney Productions, Warner Bros., Inc., Warner Bros. Distributing Corporation v. Chopot, et al.* (E.D. Wash.-Nos. C 78-243 & 360) — free off-the-air TV recordings used commercially in Fiji; *Encyclopedia Britannica Educational Corporation, Learning Corporation of America, Time-Life Films, Inc. v. Board of Cooperative Educational Services, et al.*, 447 F.Supp. 243 (W.D.N.Y. 1978), 542 F. Supp. 1156 (W.D.N.Y. 1982) — distribution to schools of free off-the-air TV educational recordings in competition with copyright owners.

can receive, so can the other — and *vice versa*. As is obvious, broadcast signals carry no information which enables the TV set or the VTR to distinguish whether the program is copyrighted or whether its owner objects to reception by recording. Respondents' evidence, rejected at trial "because of its impracticality" (R. 3169-71 — with no appeal as to the rejection), was of a puerile and inane hypothetical system presupposing that broadcast signals of respondents' programs somehow could be made electromagnetically different from signals of all other broadcasts (R. 3161-2), a supposition wholly beyond petitioners' control. Respondents' misstatement that Sony "discovered a method of overcoming this system" is another instance suggesting either respondents' reckless disregard of the evidence or its brief-writer's ignorance thereof. In truth, because of a confidentiality order obtained by respondents, petitioners never even learned of the system (R. B28-34, 3167).

In trying to deceptively side-step the findings and evidence as to the absence *of any kind* of harm, actual or potential, from home VTR reception, respondents say they "were unable to measure the amount of harm which they had suffered from *unknown VTR copies*. Respondents, however, adamantly maintained that such harm had in fact occurred . . . ." (Resp. Br. 7 n. 18). Not only did the trial court find such assertions not credible, it rendered them irrelevant *ab initio* by striking all of respondents' allegations of "unknown damages", of "unknown infringements" and of "unknown infringers" (R. A222-5, A237-9; J.A. 64; C.R. 16/151, 18/173).

Free Off-The-Air TV Programming Today.

Since respondents elected to present the district court with only a thumbs-up or thumbs-down case by suing VTR sup-

pliers instead of VTR users, *viz.*, the court either had to stop all home VTR reception or none, it was of obvious relevance to ascertain what portion of total free off-the-air TV programming was provided by respondents. For Disney, this was easy — its contribution was, and still is, a *de minimis* one hour a week (Pet. App. 38-9; Creators and Distributors *amici* Br. Appendix B). In discovery, Universal professed not to know its contribution;[7] but at trial, MCA's chairman volunteered his last minute personal survey that Universal had 75 hours of TV programming that week in the Los Angeles market — which he testified was about 5% of the total programming of the eleven local commercial stations, and was less than 5% of all TV programming if local public/educational station programming were included (R. 474-5, 532-4, 459-50).

Since respondents thus demonstrably provide less than 5% of all TV programming in a representative market selected by Universal's chief executive, and since no one else ever has brought an action to protest home VTR recording notwithstanding Universal's urging, respondents improperly attack (Resp. Br. 6) petitioners' justifiable and accurate assertion that 95 + % of all free off-the-air TV programming has been available for unchallenged home VTR reception. The significance of the number and identity of the 73 *amici* who now have lent their names to the Creators and Distributors *amici* brief is less than clear. Many obviously are not owners of copyright on the titles associated with their names. As stated, some expressly have *refused* to bring suit against home VTR reception — all have *failed* to do so. Further, the presence of several PBS stations as *amici* for

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[7] ". . . plaintiffs answer that they have no knowledge or belief as to what percentage of total television broadcast time was comprised of the motion pictures of plaintiffs in any geographical area for any time period." (Ans. Int. No. C-15, p. 23, served 3/6/78).

respondents contrasts with the fact that PBS itself is an *amicus* for petitioners in the *amicus* brief of the Ad Hoc Copyright Committee. What is of ultimate primary significance is the fact that respondents are the only entities ever to sue re home VTR reception during the 17 years since its introduction. Even taking, *arguendo* and as their best shot, respondents' *amici's* unverified claim as to the volume of their programming, it still is obvious that the bulk of free off-the-air TV programming remains available for unchallenged home VTR reception.

The substantial non-infringing, non-challenged uses of Betamax include, *inter alia*:

(a) home VTR reception of copyrighted programming whose owners consent thereto (Pet. Br. 7-9);

(b) home VTR reception of programming as to which the right of any bringing any action for infringement has been forfeited by destruction of the only copy without registration (Pet. Br. 9);

(c) home VTR reception of programming which cannot be copyrighted (*e.g.*, 17 U.S.C. § 105);

(d) home VTR reception of programming in which copyright has expired (*e.g.*, *Film Superlist: 20,000 Motion Pictures in the Public Domain*, 7 Arts Press, Inc.);

(e) making (with limited retention) by a school of off-the-air recordings of instructional television programs for the purpose of delayed viewing by students (1975 Sen. Rep. 66; 1976 House Rep. 71-2);

(f) recording of any free off-the-air TV broadcast by non-profit educational institutions, played back to students in classrooms within 10 days, and retained for 45 days (Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes, 127 Cong. Rec. 145 E4751,

October 14, 1981 — expressly consented to by respondent Universal);

(g) recording of news programs by libraries (17 U.S.C. § 108(f)(3));

(h) off-the-air recording by a cable system for one non-simultaneous transmission to subscribers (17 U.S.C. § 111(e)).

Respondents' ill-founded and misleading assertion that the trial court refused to find the home VTR capable of substantial non-infringing use (Resp. Br. 8, 13, 50-51, 54, 57 n. 122) flies in the face of the following findings:

> "The videotape recorder, like a tape recorder, is a staple item of commerce. Its uses are varied" (Pet. App. 92);
>
> "[VTR is] a new technology capable of noninfringing uses" (Pet. App. 104);
>
> "[VTRs are] used for purposes where no infringement could be alleged (*e.g.*, recording material which is not copyrighted or where permission to record is given)" (Pet. App. 106-7);
>
> "[VTRs can] legally be used to record noncopyrighted material or material whose owners consented to the copying" (Pet. App. 114).

". . . Copying Solely for Purposes of Entertainment and Convenience of Entire Copyrighted Motion Pictures."

This substantive change in counterstated question No. 1, like the analogous change in counterstated question No. 2, ignores that essentially *everything* broadcast on free off-the-air TV is a "motion picture" within the definition of 17 U.S.C. § 101, a great deal of which has a potential for copyright protection from the time of its creation (17 U.S.C.

§ 302(a)).[8] Hence, to emphasize that the main purpose of Betamax is to record entire copyrighted motion pictures off-the-air is a pointless and irrelevant waste of breath and print (*e.g.*, Resp. Br. 4-5, 42 n. 92).

However, respondents' follow-up assertions (erroneously attributed to survey findings) that "over 80% of the material copied is entertainment programming, the bulk of which is owned by respondents and supporting *amici*" (Resp. Br. 4-5, 6, 43, 52), and that "the majority [of Betamax owners] collect large libraries of VTR recordings, including recordings of motion pictures owned by respondents, which are saved indefinitely for unlimited repeat viewings" (Resp. Br. 5, 5 n. 11), are downright unsupported and false.

First, no survey limited "entertainment programming" to just the kinds of motion pictures owned by respondents; and no survey inquired about the owner's identity as to any programming recorded, entertainment or otherwise. There is no evidence entitling respondents to claim ownership to any part of any programming covered by any survey, let alone the "bulk" of it.

Second, *the cornerstone of this case is that*, after years of discovery and preparation which included without limitation the unconditional right to prepare and conduct a survey of 17,000 Betamax owners, *respondents elected to make or break their case on 32 instances of time-shift recording by four individuals* (J. A. 110-170) *and expressly disclaimed alleging copyright infringement as to any other work* (R. B175). Librarying was introduced into this case only by the surveys but, even so, neither respondents' nor petitioners' survey made any inquiry as to the recording or librarying

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[8]Petitioners expect this Court to hold, but do not concede, that the Constitution enables Congress (a) to protect motion pictures as "writings", and (b) to define videotapes as "copies".

of respondents' works or of the works of any of their *amici*; *no survey in this case relates to or supports any allegation of infringement of any work in issue*.

Third, respondents knowingly mislead the Court by challenging petitioners' statement that "there was no evidence of any librarying of any work of respondents" (Resp. Br. 5 n. 11). As stated, no survey inquired as to whether any of respondents' movies were in anyone's library. Furthermore, no survey inquired as to saving recordings "indefinitely" or for "unlimited repeat viewings". In contrast to respondents' misstatement that the district court found "pervasive librarying activities" (Resp. Br. 5 n. 11), the district court actually found "it has not been proven that many persons will 'library' to any significant extent" (Pet. App. 112); respondents' survey (PX 730, Tables Q. 10A, Q. 10B) showed that 43.4% of Betamax owners had no "movies" at all in their "library", that 5% had only one, 6.1% had two, 3.9% had three and 5.2% had four — and that 75.6% of the owners intended to keep only two or less cassettes containing television "movies, drama or comedy series". And these are the same owners who, as respondents point out, owned an average of 30 cassettes apiece (Resp. Br. 5, 5 n. 11; PX 730, Table Q. 6A). Respondents' survey (PX 730, Table Q. 9) actually showed that 38.8% of these same Betamax owners use it "almost always" for time-shift and 75.4% use it half or more of the time for time-shift.

In contrast to respondents' statement that "40% to 85% of all VTR recordings are viewed without commercials" (Resp. Br. 6 n. 14), even respondents' survey (PX 730, Table Q. 11) showed that 58.3% of Betamax owners deleted commercials "never", "rarely" or only "sometimes" — and whenever the remaining 42% did delete commercials, they had to watch them in order to do so.

Contrary to respondents' assertion that "a VTR owner is not likely to purchase a pre-recorded cassette [or disc] of the original from respondents" if he has an off-the-air recording of the same program (Resp. Br. 28 n. 57), the only two witnesses who testified on the subject said they would do exactly that (R. 876, 1652).

". . . Intending, Expecting and Encouraging That [Betamax] Be Used Primarily to Copy Entire Copyrighted Motion Pictures."

Respondents thus change question No. 2, and follow-up by misstating that petitioners "advertised, intended, expected and encouraged" the home VTR reception of "especially copyrighted motion pictures owned by respondents and *amici*" (Resp. Br. 4-5) through Betamax ads which exhorted recording of "favorite shows", "movies", "classic movies" and "novels for television", and to "build a library" (Resp. Br. 10 n. 24, 13, 42, 44, 44 n. 96, 49) — thereby inexcusably failing to add that these advertisements are irrelevant in light of the findings "that there was no evidence at trial that any advertisements or other statements by [petitioners] in any way induced or caused to be made any of the copies at issue" (Pet. App. 93-4) and that "there was no evidence that any of the copies made by Griffiths or the other individual witnesses in this suit were influenced or encouraged by these advertisements" (Pet. App. 96-7).

Moreover, the foregoing ads all date back to the earliest days of Betamax advertising. After respondents belatedly reversed their field in late 1976 and sued, rather than praised, Sony because of home VTR, subsequent Betamax ads were carefully worded to state only the technical capabilities of Betamax and to mention unchallenged kinds

of programming for home recording -- and each buyer continued to get an individual *caveat* about unauthorized recording (*supra*).[9]

Summary of Contributory Infringement in This Cause.

This cause is not a copyright law classroom exercise nor a law review article — where facts can be assumed or ignored at will so as to provide a vehicle for a pre-formed conclusion or to achieve a desired result. Neither is it a legislative hearing, where partisans can grind their own axes without fear of cross-examination (*e.g.*, Resp. Br. 3 n. 6, 4 n. 7, 26 n. 54, 29 n. 59, 35 n. 74).

The precise and only issue to be decided by this Court is whether petitioners are liable for contributory infringement based on the 32 free off-the-air TV home VTR time-shift recordings in issue of Griffiths, Lowe, Soule and Wielage (with the absence of actual harm being admitted, with no proof of potential harm with respect thereto being offered, and with the absence of potential harm being affirmatively proved). There is no allegation or evidence on which to adjudicate anything else. The underlying important question of federal law to be resolved implicitly by this decision is whether the American public can be deprived of the technical advance of home VTR reception of free off-the-air TV by two copyright owners who voluntarily commingle their programming with all other TV programming.

The evidence is overwhelming that Betamax was conceived, developed and supplied to the American public by Sony in good faith, and with respondents' encouragement, as a beneficial technical advance in free off-the-air TV re-

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[9]Respondents knowingly undermine petitioners' *caveat* to VTR buyers about "unauthorized" recording when respondents represent publicly that they never will sue any home VTR user — see Pet. Br. App. A. Such representations carry a clear implication of "authorization".

ception; that respondents' objection to home Betamax reception of their programming came late in the game; that not only substantial, but actually the bulk of, TV programming is available for unchallenged Betamax reception; that some kinds of VTR reception using Betamax are expressly permitted by statute; that petitioners did not induce, cause or contribute to the home reception in issue other than by the mere act of having made Betamax available to the general public.

It requires no belaboring of common sense or judicial precedent to recognize, after knowledge of the true facts, that respondents have presented no case of contributory infringement by any petitioner.[10]

II.
THE ISSUE OF DIRECT INFRINGEMENT.

Question No. 1 in the petition, of direct infringement by home VTR owners (*viz.*, Griffiths, Lowe, Soule or Wielage), presents several considerations.

First, respondents voluntarily licensed their 32 works in issue for broadcast for profit, with the unequivocal intention and expectation that each of Griffiths, Lowe, Soule and Wielage would receive and view each work he recorded. Using Betamax, each individual did no more than just that; each viewing was soon after the broadcast and each recording would have been erased soon after the viewing except for respondents' counsel. No detriment to the value of any of the 32 works was caused. Respondents picked these instances on which to base their case; these 32 in-

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[10]Respondents' aspirations to induce Congress to impose a royalty on a staple item of commerce such as the home VTR for the purpose of paying the proceeds over to copyright owners (Resp. Br. 10-11, 11 n. 26) will find no such authority conferred on Congress by the Constitution. *Citizens Savings & Loan Ass'n. v. Topeka*, 87 U.S. (20 Wall.) 655, 664 (1875).

stances present the sole case to be decided, yet Brief for Respondents literally ignores them totally.

A finding that these instances involve no direct infringement supports and requires a finding that there was no contributory infringement with respect thereto.

On the other hand, if this Court concludes that there can be no contributory infringement in this cause irrespective of direct infringement, then the cause has been completely resolved without any necessity for a holding as to whether there was direct infringement. Lowe, Soule and Wielage are not parties to the cause; Griffiths is a straw man (a client of respondents' counsel, granted total immunity by respondents, never represented by counsel, never having appeared as a party to the cause — Pet. App. 43-4; R. A88, A158-9).[11]

Moreover, respondents have represented to the public and to this Court that no home VTR user ever will be sued by them. Hence, what would be accomplished by a pronouncement of this Court that any home VTR reception in issue was direct infringement? Further, respondents evade answering the point that such a representation and authori-

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[11] *Amicus* New York City Bar Committee's brief (p. 2 n. 1) concurs with petitioners on this point, which respondents have tried so hard to obfuscate.

The Bar Committee's brief (p. 11 n. 6) further points out the illegality of using two VCRs in tandem to duplicate a rented copyrighted prerecorded cassette — which can be done but which requires no use of either VCR's built-in tuner. Yet, respondents expressly make no objection to the supply of VCRs without built-in tuners (Resp. Br. 5 n. 9). This further failure of *amicus* Bar Committee to interface supportively with respondents illustrates that infringement actions should be directed to particular improper usages of the VTR or of its recordings, not to the VTR itself or to its suppliers. In contrast, respondents are exacerbating the situation by assuring VTR users that they never will be sued no matter what they record.

zation has been held by this Court to be a future license under federal law, absolving both direct and contributory infringement (Pet. Br. 40-1, 44; Resp. Br. 40 n. 84).

REPLY TO ARGUMENT.

Stripped of their foundation of factual misrepresentations, the arguments in Brief for Respondents become pointless and fallacious — and encompass nothing not already refuted by Brief for the Petitioners. The arguments distill down to nothing more than that 32 "copies" were made and that there is no express exemption from infringement for home VTR reception in 17 U.S.C. §§ 108-118. The arguments constitute a perfect example of the copyright statutes being "read with blinders" (*Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1350 (Ct. Cl. 1973), aff'd by equally divided court, 420 U.S. 376 (1975)). Respondents try to support the Court of Appeals' holding that intrinsic use never can be fair use (question No. 3 in the petition). But as the Court of Appeals pointed out (Pet. App. 17), *Williams & Wilkins Co.* held that "intrinsic use" could be "fair use" — and that case was a prominent part of the "present judicial doctrine of fair use" which section 107 "restated" and did not "change, narrow, or enlarge" (1975 Sen. Rep. 62; 1976 House Rep. 66). Respondents nit-pick as to whether legislative history shows an "implied exemption" for home recording or whether it shows home recording to be fair use (*e.g.*, Resp. Br. 8 n. 20, 31 n. 66). But petitioners' position is simply that legislative history shows Congress did not regard or intend home recording to be copyright infringement — without pettifoggery as to how this position is expressed.

The arguments in respondents' *alter ego amici* briefs of the MPAA, of the so-called Creators and Distributors, of the Guilds and of IATSE add nothing. Collectively, these

simply reflect the self-interest of people who are in the unique and enviable position of being able to do a job once and normally to be paid and repaid for it many times over. Their motion pictures historically and primarily are licensed for exhibition via "secure media" such as theatres, cable TV, pay-TV, satellite, etc. (distribution media of each kind being owned or being acquired by respondents and their *amici* — except maybe theatres: see *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948)), where reception can be controlled by them; and are sold on prerecorded discs or cassettes reserving to themselves as much control over usage thereof as the law permits. But when these works are exploited in a medium originated and maintained for the free use of the general public, something has to give. Respondents have no right to start exploiting their works in the established free TV medium, and then to arrest technical progress in that medium using their copyrights. Unless the tail is to wag the dog, the interest of the copyright owners must accommodate to the longer-standing and paramount interests of the public — call it implied consent based on their broadcast (J.A. 77), First Amendment supremacy (J.A. 77), fair use (J.A. 76) or whatever.

The *amici* briefs of the RIAA, of the Music Publishers and of CBS simply constitute attempts by sound recording owners to use this case as a lever to help them renege on the bargain they made with Congress in 1971 — *viz.*, a waiver of any claim against home recording in order to get protection against the commercial pirate.

The *amici* briefs of the Authors League and of the American Publishers, and of the two copyright lawyer groups, merely reiterate the copyright owners' rote position in the never-ending battle to expand their rights vis-a-vis educators, the public, etc.

None of the *amici* briefs meets the criterion of Sup. Ct. Rule 36.3 by setting forth any relevant fact or relevant question of law not already adequately presented by the parties.[12] Each does show clearly the *amici's* preoccupation with their own special interests, typified as to all by the international president of *amici* IATSE:

> "Q. Do you have any opinion one way or another whether the Betamax is a beneficial instrument for the American public in general?
>
> "A. For the American public in general, it is possible and probable that it is. To the people that I represent, the answer is no."
>
> Deposition of Walter F. Diehl, May 17, 1978, p. 74.

CONCLUSION.

The American public is entitled to view, in the privacy of the home, any free off-the-air TV program broadcast to it. Those who are unable to be in front of their TV sets at the time of broadcast now have been enabled by science to view, and should be entitled by law to view, the broadcast via time-shift using home VTRs. A few dissident copyright owners should not be permitted to deprive the American public of this progress of science. If and when there may be improper usages of the VTR or of its recordings, be it copyright infringement or otherwise, then the appropriate

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[12]The presentation by respondents (Resp. Br. 35) and by several *amici* of various written expressions of supposedly objective opinion by Professor Melville B. Nimmer, whom they modestly describe as "the country's leading copyright expert", omit to inform the Court that Professor Nimmer is not an impartial author on the subject of home recording but in fact has been retained for compensation by *amici* RIAA and National Music Publishers Association, Inc. to advocate publicly against it. See: *Hatch v. Ooms*, 69 F.Supp. 788 (D.D.C. 1947); rev'd sub nom. *Dorsey v. Kingsland*, 173 F.2d 405 (D.D.C. 1948), rev'd 338 U.S. 318 (1949), reh'g. den. 338 U.S. 939 (1950).

legal action should be against such usages — but not against the VTR or its suppliers.

Respectfully submitted,

DEAN C. DUNLAVEY,
(Counsel of Record),

DONALD E. SLOAN,

Attorneys for Petitioners
Sony Corporation of America, et al.

Of Counsel:

MARSHALL RUTTER.

December 3, 1982.

APPENDIX A.

The New York Times
(Wednesday, June 9, 1965).

$995 Home TV Tape Recorder To Be Introduced Here by Sony

By GENE SMITH

The Sony Corporation of America took the lead yesterday in home video tape recording.

The American branch of the Japanese electronics company introduced a $995 portable unit, called a Videocorder, said to be as easy to operate as an ordinary tape recorder.

Akio Morita, president of the American subsidiary, said in an interview here that the new units, combining both a video tape recorder and a television receiver, would be available here within eight weeks. He said he foresaw "a very great potential" for the device and expected sales to reach "a couple thousand a month in the very near future."

Mr. Morita, who is also executive vice president and cofounder of the Sony Corporation of Tokyo, said he personally uses the set, with its optional camera, to take motion pictures of his golf game.

"This equipment," he said, "should find a good market here for politicans. They can film and study their talks, record them for $21.95 a half-hour and distribute them to local television stations for future use."

Representatives of Arthur D. Little, Inc., who were present at yesterday's showing, said their company had been "closely associated with Sony" in the developmental period. One added that Little worked with Sony on "the appraisal of markets and a general understanding of American buying habits."

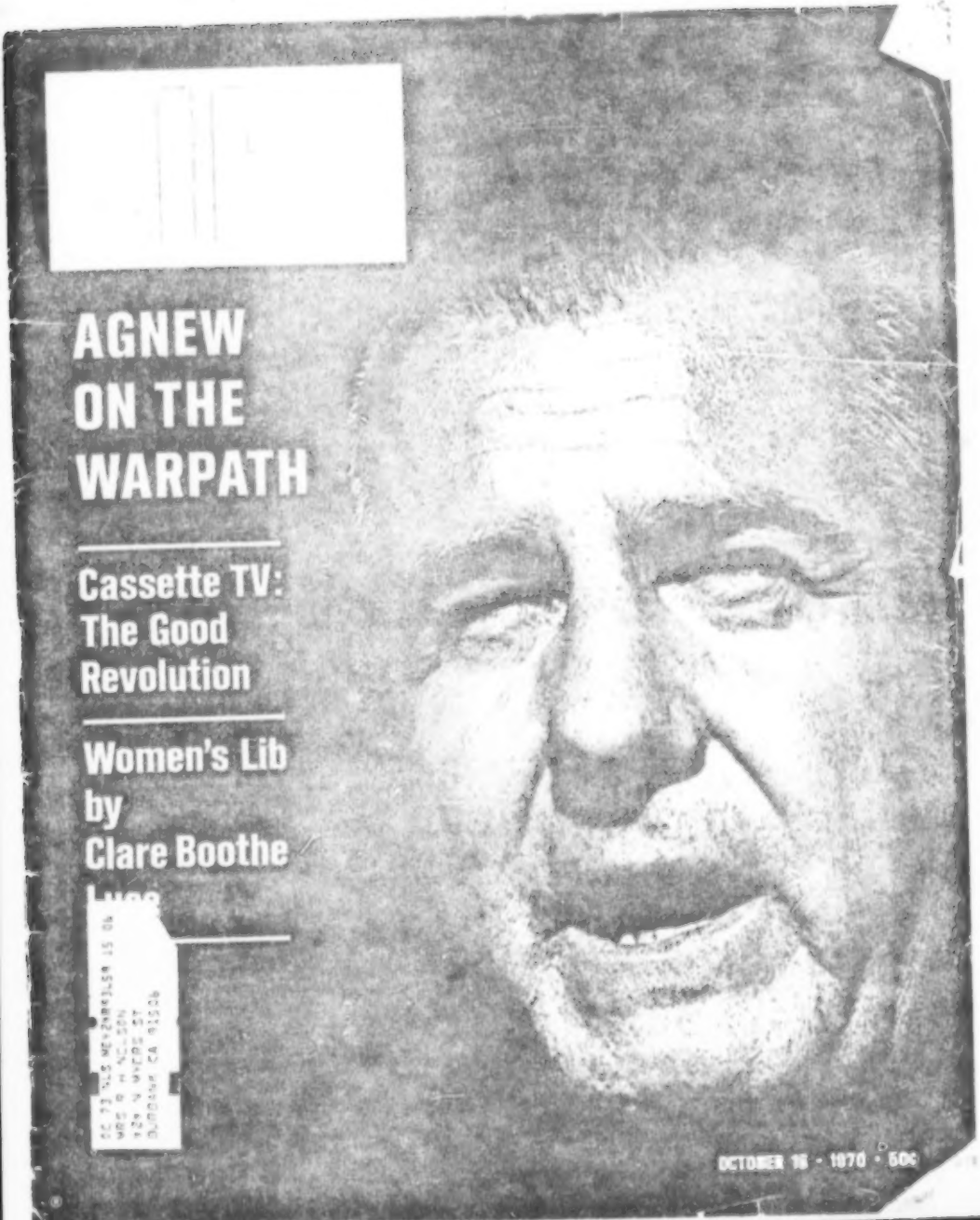
The Videocorder is a combination TV receiver and a companion audio-video recorder. It is housed in a single cabinet made in the United States. The receiver can be used separately as a TV set.

The recording unit can be operated during a telecast and will not distort the viewing picture. It can then be replayed as any audio tape and will give both a black-and-white picture and the sound through the receiver. Certain models have timing devices that can be pre-set to turn on automatically to record programs while the owner is away.

Sony has also developed a companion camera kit that will use the video tape, take black-and-white motion pictures and sound, show them simultaneously and record as well for future use. It sells for $350.

APPENDIX B.

Life Magazine.
(October 16, 1970).



EXCERPT

(Entire magazine lodged with the Clerk)

The player unit shown at left with a cassette being lowered into it is Sony Corp.'s entry in the race. Like other systems that use videotape as recording medium, Sony's will permit viewers to tape broadcast TV programs. A home model will reach the U.S. early in 1972 after first being sold in Japan.

(continued next page)

What to expect

BRAND NAME	TARGET DATE FOR HOME MODELS	ESTIMATED PLAYER COST
AVCO Cartrivision	mid-'71	$800-$900 with color TV console
NORELCO Video Cassette Recorder	late '71	$500-$600
SONY Videocassette	early '72	$400
AMPEX Instavision	mid-'72	$500
CBS Electronic Video Recording	mid-'72	$400
RCA SelectaVision	late '72	$400

—and when

RECORDING CAPABILITY		ESTIMATED
Camera	TV broadcasts	CASSETTE COST*
yes	yes	$14
yes	yes	$20
probably	yes	$20
yes	yes	$20
no	no	$30
no	no	$10

*Prerecorded color, per half hour

APPENDIX C.

"Q. Are you aware that radios are made in combination with cassette recorders that are capable of recording radio broadcasts as they are taking place?

"A. Yes.

* * *

"Q. Do you have any knowledge or information whether broadcasts of records in which MCA has copyright interest have been recorded in that fashion.

* * *

"A. My belief is that they have.

"Q. What has MCA done in the past about pursuing or investigating its copyright interests in that kind of recording?

* * *

"A. I don't know that MCA has done anything. . . . I am not advised at the moment that it is a litigable form of piracy . . . it's my understanding . . . that we don't have a cause of action in the sound recording area."

Deposition of Sidney J. Sheinberg,
MCA president, June 10, 1977, pp. 123-6.

APPENDIX D.

"Q. Were you the first one at MCA that said let's bring a lawsuit?

"A. Yes, sir.

* * *

"A. . . . I advised him [Card Walker of Disney] that MCA planned on filing a lawsuit and asked whether or not they would like to join as parties plaintiff. . . ."

* * *

"A. . . . the statement that we were proceeding in this area was made before a meeting of the MPAA. Frank Wells took it upon himself to send a letter to other members of the MPAA indicating his belief that such other companies should also join the lawsuit."

Deposition of Sidney J. Sheinberg,
MCA president, June 10, 13, 1977,
pp. 123, 214, 217.

APPENDIX E.

Exhibit	Offered Into Evidence	Admitted
A	R. 3077, 3078	R. 3213
B	R. 3077, 3079	R. 3213
C	R. 3077, 3079	R. 3213
D	R. 3077, 3111	—
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No. 81-1687

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SONY CORPORATION OF AMERICA, ET AL.,

Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. AND WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF AMICUS CURIAE OF THE AMERICAN LIBRARY ASSOCIATION

NEWTON N. MINOW*
MARY M. HUTCHINGS

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000
Attorneys for Amicus Curiae, American Library Association

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* Counsel of Record

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN LIBRARY ASSOCIATION

INTEREST OF THE AMICUS CURIAE

The American Library Association ("ALA"), by its attorneys, respectfully files this brief Amicus Curiae in support of petitioner Sony Corporation of America.*

The ALA is the world's oldest and largest library association. Its 39,000 members include libraries, librarians, library trustees and friends and patrons of libraries, repre-

* Consent of the parties has been granted and is on file with the Court.

senting a wide spectrum of users of copyrighted materials. A principal mission of the ALA and of libraries is to insure that all in our society have access to information under terms that are fair both to copyright owners and users of copyrighted works. For this reason, the ALA, throughout its history, has been in the forefront of copyright law revision. In particular, the ALA was one of the major consultants to the architects of the Copyright Revision Act of 1976.*

The Ninth Circuit's decision in this case has major implications for libraries and librarians and for the public's right of access to information and entertainment. First, the Court's holding below that "intrinsic" uses of copyrighted materials cannot be "fair" uses will profoundly affect the ability of librarians to serve their patrons effectively. Libraries are the critical link in bringing new information technologies to the public at large. Libraries permit the masses to use such technologies otherwise available only to the affluent. Thus, many libraries now, and in the future most libraries will, provide patrons with access to video recorders for "in-library" use. An increasing number of libraries provide off-air tapes of news and other programming for in-library viewing for patrons who, for financial reasons, may be unable to purchase their own recorders, and who otherwise would be denied access to broadcast programming. If the decision of the Court of Appeals is not reversed, libraries could be accused of making, or of aiding and abetting, unfair "intrinsic" uses of copyrighted materials.

Second, the Ninth Circuit's holding that "intrinsic" uses of copyrighted materials must be justified by a substantial countervailing social benefit will seriously affect public ac-

* The Association has worked with coalitions of publishers, other copyright owners and copyright users in general to establish voluntary guidelines governing photocopying of library materials for classroom use, educational uses of music, and off-air taping.

cess to information and severely constrict the traditional role of libraries. For example, libraries frequently are asked to photocopy articles from journals for patrons when such copying has no significant market impact. Upon receiving such a request, a librarian can, however, neither predict nor know with any degree of certainty whether such reproductions bestow a benefit to society sufficient to satisfy the Court of Appeals's test. Furthermore, a librarian can neither inquire as to the patron's need for and planned use of the requested material nor judge its educational or scientific value without violating long-established ethical principles of librarianship.

Accordingly, the Court of Appeals's holding effectively creates a dichotomy between entertainment and education. This dichotomy will restrict public access to information and constrict the judicially recognized role of libraries as "a mighty resource in the free market place of ideas." *Minarcini* v. *Strongville City School District,* 541 F.2d 577, 582 (6th Cir. 1976).

Finally, the Ninth Circuit's construction of Section 108 of the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.* (1976), threatens the fair use rights of libraries and librarians under Section 107. The Ninth Circuit stated that Section 108 clearly manifests Congress's intent not to create a blanket home video recording exemption. Section 108, however, grants certain rights to libraries over and above those available under the fair use provisions of Section 107. Thus, the Ninth Circuit's implication that a library's reproduction rights are limited to those available under Section 108 contradicts the manifest intent of Congress.

In sum, the issues raised by this case are of great national importance to libraries, librarians and users of libraries. For this reason, and because the ALA believes its analysis of those issues may assist this Court in resolving them, the ALA respectfully submits this brief as Amicus Curiae.

ARGUMENT

SUMMARY OF ARGUMENT

The Ninth Circuit held that only "productive" uses of copyrighted materials could be fair uses under the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et. seq.* (1976). This holding ignores Congress's intent as well as the express language of the statute and is in clear conflict with the decision of the Court of Claims in *Williams & Wilkins Co.* v. *U.S.*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court,* 420 U.S. 376 (1975). The questions concerning fair use decided by the Ninth Circuit possess enormous national importance, particularly for librarians and library users, for the Ninth Circuit's wooden interpretation of Section 107 of the Copyright Act will seriously affect the ability of librarians to serve their patrons and will restrict the public's access to information. In addition, the Ninth Circuit's holding threatens to deprive libraries of their fair use rights and further undermines their ability to serve their patrons adequately. Rapid technological changes in the information industry and the need to strike a workable, reasonable balance between the interests of copyright owners and copyright users require that this Court reverse the Ninth Circuit's decision.

I. THE HOLDING OF THE NINTH CIRCUIT COURT OF APPEALS THAT "INTRINSIC" USES OF COPYRIGHTED MATERIALS CANNOT BE "FAIR USES" UNDER SECTION 107 OF THE ACT IS IN ERROR AND IN CONFLICT WITH THE DECISION OF THE COURT OF CLAIMS IN WILLIAMS & WILKINS CO. V. U.S.

The Court of Appeals held that "intrinsic" uses of copyrighted materials cannot be "fair" uses. This holding conflicts with both the clear intent of Congress to establish a flexible fair use doctrine and the express terms of the stat-

ute itself. In reaching its decision, the Ninth Circuit concluded that the provisions of the Act are "clear and unambiguous" and that an examination of legislative history is therefore unnecessary. This Court, however, has noted: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Association*, 310 U.S. 534, 543-44 (1940) (footnotes omitted). Such assistance is possible here.

The House Report which accompanied the amendment to the Act of 1909 concerning sound recording (which Congress later incorporated into the new Act) unequivocally established that "intrinsic" uses are not *ipso facto* copyright infringements. Concerning the "intrinsic" use of home audio recordings, the Report stated: "[I]t is not the intention of the Committee to restrain the home recording from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it." H. Rep. No. 487, 92nd Cong., 1st Sess. 7, *reprinted in* [1971] U.S. Code Cong. & Ad. News 1566, 1572. Similarly, the Register of Copyrights stated in a 1961 report: "New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright."* Copyright Law Revision, Report of the Register of Copyright (July, 1961) at 30. The treatise from which the Ninth Circuit frequently quoted acknowledges that the legislative history of the New Act "does not appear to recognize" the

* This Court has held that it will "accord great weight to a departmental construction of its own enabling legislation." *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969).

principle of "productive use." 3 Nimmer on Copyright ¶ 13.05[A] 13-59 n. 23.8. Thus, the Court of Appeals was simply wrong when it held that "intrinsic" uses cannot be fair uses.

The Ninth Circuit's holding that fair use must involve "the use by a second author of a first author's work" also conflicts with the flexible fair use analysis required by Section 107 of the Act. Section 107 identifies four factors courts are to consider in determining whether a use is fair: the nature of the copied work, the purpose of the copying, the substantiality of the copying, and the effect of the copying on the potential market for the work. These factors are, as the district court pointed out, neither exclusive nor required. By *automatically* excluding all "intrinsic" uses from fair use protection, the Ninth Circuit imposed a rigidity on fair use analysis entirely unwarranted by the statute. As the Second Circuit has observed, "The line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria." *Meeropol* v. *Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (citations omitted). Thus, in *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980), the Fifth Circuit held that while a commercial motive may be relevant to fair use analysis, there can be no *per se* rule that such a motive precludes fair use. The Ninth Circuit's holding arbitrarily establishes a similar *per se* rule.

If not reversed, the Ninth Circuit's holding will result in further decisions clearly contrary to the underlying purpose of the statute. This purpose is to balance the economic interests of an author against the public interest in access to his work. *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1974). The decision of the Ninth Circuit means that, for example, a person who must work during the

evening and is therefore unable to watch commercial television during "prime-time" may not record a program (such as the critically acclaimed docu-drama "Roots") for a private viewing at a more convenient time even if the tape is erased after a single viewing and even though such a recording may actually increase the viewership, and thus the profits of the copyright owner.

This result is totally inconsistent with the balancing approach which is at the heart of the doctrine of fair use. A program such as "Roots" is both entertaining and educational and is voluntarily broadcast over commercial television by copyright owners who presumably desire to have the largest possible viewing audience. The only purpose of recording such a program in the above example is to gain access to it. And arguably the fact that the program is erased after viewing is just as relevant to a determination of "substantiality" as the fact that the entire program may be taped. *See* Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright law*, 31 Stan. L. Rev. 243, 256 (1979). Finally, it is difficult to see how such a recording harms the copyright owner when it merely accomplishes the purpose of the original broadcast. Thus, while *some* "intrinsic" uses of video tape recorders no doubt constitute copyright infringement, other "intrinsic" uses, such as the above example, are clearly protected by the doctrine of fair use. The Ninth Circuit was in error, therefore, when it held that *all* "intrinsic" uses are infringing uses.

The Ninth Circuit's decision is also in direct conflict with the court's decision in *Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).* In *Williams & Wilkins*,

* *Williams & Wilkins Co.*, dealt with issues now primarily addressed by Section 108 of the law, and upheld certain institutional photocopying practices.

the Court of Claims upheld the applicability of the fair use doctrine to certain "intrinsic" uses of copyrighted materials by the National Library of Medicine. In rejecting the decision in *Williams & Wilkins*, the Ninth Circuit disregarded the intent of Congress that Section 107 "restate the present judicial doctrine of fair use, not to change, *narrow*, or enlarge it in any way." H. Rep. No. 1476, 94th Cong. 2d Sess. 66 (1976) (emphasis added). The Ninth Circuit's holding that intrinsic uses cannot be fair uses *narrows* the application of the doctrine and thus conflicts with Congress's intent.

The Ninth Circuit further held that in any event *Williams & Wilkins* could be distinguished because of the countervailing social benefit of the uses of copyrighted materials in that case and the disastrous social consequences of reduced access to the scientific materials there in issue. This holding will seriously inhibit public access to all kinds of information through libraries. Libraries cannot know in advance whether any patron's use of copyrighted materials will be of sufficient social benefit to meet the Ninth Circuit's stringent test and yet if a use fails that test, libraries and librarians could be contributory infringers under the Ninth Circuit's decision. The kinds of materials typically photocopied by libraries or otherwise reproduced for patrons are often for scholarly and research purposes, but there are in practice no lines between information and entertainment as clear as the Court of Appeals is able to discern for purposes of its analysis of this case. Indeed, as this Court observed in *Stanley* v. *Georgia*, 394 U.S. 557 (1969): "The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all."

The "ordinary" purpose of a television program may be to entertain or to inform—in either case it may well serve to educate, to generate thought, criticism, comment and

scholarship, and to provide the basis and background against which critical thought may take place. Librarians, as the store-keepers of knowledge in all its tangible forms, cannot agree with the Court of Appeal's cavalier judgment that "the consequences attendant upon reduced consumer control of access do not in any way correspond to the deleterious consequences of reduced access identified by the Court of Claims in *Williams & Wilkins Co." Universal City Studios, Inc.* v. *Sony Corporation of America*, 659 F.2d 963, 971 (9th Cir. 1981).

The ALA believes that the purposes of the original broadcasts here in issue and of home videorecordings in general are not the same. The purpose of the first is the *commercial* distribution of the programming; the second is the non-profit, *non-commercial,* private use of that same programming. The Court of Appeals has treated home recording as if it were done for the purpose of commercial gain or advantage, and in so doing has established the fair use doctrine as a censor of the kinds of private, non-commercial uses for which an individual or a library may use copyrighted material. It has confused commercial, systematic, multiple copy reproduction with *ad hoc private, non-commercial* activity and has established a distinction between such uses not previously found in the fair use doctrine. Because this confusion will seriously affect libraries' and patrons' rights of access to information, this Court should reverse the decision below.

II. THE NINTH CIRCUIT'S DECISION FAILED TO RECOGNIZE THAT THE FAIR USE RIGHTS OF LIBRARIES UNDER SECTION 107 ARE IN ADDITION TO SPECIAL LIBRARY RIGHTS UNDER SECTION 108; THIS ERROR JEOPARDIZES THE PUBLIC'S RIGHT OF ACCESS TO COPYRIGHTED MATERIALS.

The Ninth Circuit's holding that Section 108 establishes that Congress did not intend to create a home recording exemption seriously misconstrues the intent of Section 108. The Ninth Circuit referred to the limitation in Section 108 that requires libraries to distribute taped audio visual material only by lending and concluded "In light of this caution with respect to the limited § 108 exemption, it is clear that Congress did not intend to create a blanket exemption for home videorecording. . . ." *Id.* at 967. This conclusion overlooks the fact that Section 108 grants to libraries and archives open to the public certain rights *in addition* to those granted under the fair use provisions of Section 107. The decision below, if it is allowed to stand, is likely to be construed as a definition of *all* of a library's reproduction rights, when in fact Section 108 was meant to allow libraries to engage in certain additional activities, such as interlibrary loan arrangements, which may not otherwise be deemed fair use. The Act specifically states: "Nothing in this section . . . in any way affects the right of fair use as provided by Section 107. . . ." 17 U.S.C. 108(f)(4) (1976). The House Report specifically notes that although Section 108(h) generally removes musical, graphic, sculptural, motion pictures and non-news audiovisual works from the library reproduction exemption, "it is important to recognize that the doctrine of fair use under Section 107 remains *fully applicable* to the photocopying *or other reproduction* of such works." H. Rep. No. 1476, 94th Cong. 2d Sess. 76 (1976).

The public relies on libraries as its primary source of many kinds of information. Economic conditions have placed a great strain on library services, and interlibrary loans, networks, photocopying and other forms of resource

sharing have allowed libraries to maintain high levels of public service without adversely affecting the market for copyrighted works. It is thus vital to the public interest that libraries utilize both Sections 107 and 108 of the Act in fulfilling requests for information and service and that the Ninth Circuit's decision not undermine this access by its misinterpretation of Section 108.

CONCLUSION

The Ninth Circuit's decision is in error and conflicts with the express terms of Sections 107 and 108 of the Copyright Revision Act of 1976, with relevant legislative history, and with the decision of the Court of Claims in *Wilkins, supra,* with respect to the availability of the fair use defense for "intrinsic" uses of copyrighted materials. Because the Ninth Circuit's holding jeopardizes legitimate public access to copyrighted material, the American Library Association respectfully urges this Court to reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

NEWTON N. MINOW*
MARY M. HUTCHINGS
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000
Attorneys for Amicus Curiae, American Library Association

Of Counsel

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

* Counsel of Record

Amicus Brief

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BRIEF AMICI CURIAE OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AND ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC.

CHARLES H. LIEB
(Counsel of Record)

JON A. BAUMGARTEN
DAVID S. KLAFTER

PASKUS, GORDON & HYMAN
45 Rockefeller Plaza
New York, New York 10111

Attorneys for Amici Curiae, Association of American Publishers, Inc. and Association of American University Presses, Inc.

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BRIEF AMICI CURIAE OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AND ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC.

Preliminary Statement

The Association of American Publishers, Inc. (AAP) and the Association of American University Presses, Inc. (AAUP) submit this brief Amici Curiae in support of the position of the respondents Universal City Studios, Inc. and Walt Disney Productions, Inc., as sustained by the Court below, that the home video recording of respondents' copyrighted motion pictures by the defendant William Griffiths and by others not joined as defendants infringed the respondents' copyrights in those works. AAP and AAUP will not address the issues of vicarious or contributory liability in this brief.

AAP is a trade association of book publishers in the United States. Its more than 300 member companies and

subsidiaries publish between 70% and 75% of the dollar volume of all books published in the United States. Some of its members also produce and distribute audiovisual works. Virtually all of such publications and audiovisual works are protected by copyright.

The AAUP is an educational not-for-profit association serving university presses. Its 80 members and 5 affiliates include the presses of virtually all of the most distinguished American universities, as well as several Canadian and international scholarly publishers.

The Interest of the *Amici*

AAP's and AAUP's interest is direct and compelling. Fair use has traditionally served as an "escape valve" to provide relief in an individual case from the finding of infringement that otherwise would be required by a literal reading of the copyright statute. The doctrine is not and never was intended to excuse widespread copying of the same copyrighted work by a multitude of users at the same time nor is it nor was it ever intended to threaten existing or emerging markets from which substantial investments must be recouped.[1] To the extent that that doctrine might be so applied in this case as requested by the petitioners, AAP and AAUP members would be seriously prejudiced.

Additionally, AAP members own copyright in the works underlying motion pictures shown on television and retain an interest in such audiovisual rights in their works. The detrimental effect of uncompensated home video-recording on these subsidiary rights should not be ignored.

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[1]Remarks of David Ladd, Register of Copyrights, to the Patent, Trademark and Copyright Section of the American Bar Association (Aug. 10, 1982).

Summary of Argument

Section 106 of the Copyright Law[2] grants to the owner of copyright in an audiovisual work the exclusive right to record (reproduce) the copyrighted work, subject only to the limited exemptions created by sections 107-118 of that law. Conceding that no other exemption is available, petitioners rely solely on fair use, as provided for in section 107, to defend the widespread home recording of copyrighted audiovisual works. Petitioners' Brief at 20-31.

Unauthorized recording of all or a substantial part of a motion picture or other audiovisual work, however, is not a fair use under section 107, whether the recording is made at home or elsewhere. Fair use can never excuse copying which, as here, threatens to reduce existing, emerging or potential markets for the work copied. Nor is the fair use doctrine applicable to the copying of all or substantial parts of copyrighted audiovisual works, a practice which is widespread now and which can be expected to become more prevalent as the market for home recording equipment increases.

Home recording cannot be excused or exempted, as petitioners claim, as simply a mechanical step enhancing the viewer's capacity to receive the broadcaster's signal. Home recording is home copying and is to be judged by the same standards by which other copying is judged.

If unauthorized home recording of copyrighted material is deemed to be in the public interest, a statutory revision would be needed to exclude home recording from the bundle of rights granted to the copyright owner. Such a radical change, however, should not be permitted by a distortion of the fair use doctrine.

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[2] Unless otherwise indicated, all references to the "Copyright Law" are to the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2451 (codified in Title 17 U.S.C.).

The decision in *Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam), was mistakenly relied on by the trial court and is mistakenly cited to this Court as being in conflict with the decision of the court of appeals below.

First, the cases are clearly distinguishable. For example, *Williams & Wilkins* was a library case, not a "user" case, and a "public benefit" case,[3] not a personal "convenience" case, as here. Second, the decision of the Court of Claims in *Williams & Wilkins* was handed down as a "holding operation"to permit Congress to enact its preferred solution, and Congress has now enacted its preferred solution, *overruling Williams & Wilkins*.

The activity before the court in *Williams & Wilkins* is now subject to a *statutory exemption*, available only to libraries and archives qualifying under section 108(a), and then only in the carefully limited instances described in sections 108(d), 108(e), and in the interlibrary arrangements proviso of section 108(g) (2).

ARGUMENT

I.

Home video tape recording of copyrighted audio-visual works is not fair use.

Griffiths' recording of respondents' copyrighted motion pictures infringed the respondents' copyrights and was not excusable as a fair use under section 107 of the Copyright Law.

The design of the 1976 Copyright Law is clear. Section 106 grants the copyright owner a bundle of exclusive

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[3] The case involved copying for the purpose of medical research.

rights in his work, subject only to the narrow exemptions in sections 107 through 118, which permit others to make occasional use of copyrighted works in limited circumstances. The respondents are owners of copyrights in their motion pictures and as such have the sole right, subject only to the provisions of sections 107-118, to make copies of those works.

There is no statutory exemption for home copying. Unless permitted as a fair use under section 107, no one has the right to reproduce the respondents' motion pictures, whether at home or elsewhere, whether for personal enjoyment or for the enjoyment of others, or whether for profit or for non-profit purposes, unless authorized by the copyright owner. But as demonstrated below, fair use is inapplicable to this case.

The petitioners contend that Griffiths was not an infringer because the recordings he made were excusable as a section 107 fair use. The petitioners rely solely on fair use; they do not argue that a home video recording of a copyrighted motion picture is permissible on the basis of any other exemption. Thus, they concede that if such recordings are not fair use the reproductions by Griffiths and others will constitute an infringement of the exclusive rights granted by section 106.

The 1961 Report of the Register of Copyrights provided illustrative examples of the kinds of uses that may be permitted under the doctrine of fair use: quotations of excerpts in reviews or criticisms for purposes of illustration or comment; quotation of short passages in a scholarly or technical work; use in a parody; summary of an address or article with brief quotations in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legistative or judicial proceedings or reports; and incidental and fortuitous reproduction in a

newsreel or broadcast of a work located at the scene of an event being reported. *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 24 (July 1961).

These examples, indicating the "general scope of fair use," *id.*, have been cited with consistent approval in the subsequent legislative history of section 107 of the 1976 Copyright Law. H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967), at 29; S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975), at 61-62; H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), at 65.

Although the examples are "by no means exhaustive," H.R. Rep. No. 94-1476, *supra*, at 65, they aptly convey the fair use doctrine's traditional limitations which are incorporated in the statutory language of section 107. Section 107 provides that noninfringing fair use of a copyrighted work can be made "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." This statutory framework for fair use, as well as the listing in the second sentence of the section of the four factors to be included in determining whether in any particular case there has been fair use, taken together with the legislative history, establish that widespread, general use of video tape recorders (VTRs) cannot fall within the bounds of the fair use doctrine.

The legislative history recognizes that fair use as provided in section 107 is "essentially supplementary by nature," S. Rep. No. 94-473, *supra*, at 65. Implicit in the language of the section itself is that it be applied in a particular case on a case-by-case basis, as distinguished from applying it generally to a broad class, such as all who engage in home recording on VTR equipment.[4] Further,

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[4] S. Rep. No. 94-473, *supra*, at 62; *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, *supra*, at 24.

in applying the doctrine, the section explicitly requires that weight be given to the "substantiality of the portion used" (as contrasted with the whole of the work), and "[t]he effect" that the use will have "upon the potential market for or value of" the copied work. The "potential market," of course, is "as broad as the exclusive rights in § 106 allow." Remarks of David Ladd, Register of Copyrights, to the Patent, Trademark and Copyright Section of the American Bar Association, *supra*.

Griffiths' use was not "supplementary." It was not for scholarship or research or for any of the other purposes referred to in the first sentence of section 107. It was an intrinsic use, intended solely for enjoyment, the purpose for which the work was created.[5] It was a use of the *whole* of plaintiffs' works, not of a "portion," substantial or otherwise.[6] And it was a use, the effect of which, *together with similar use by others*, could only be to limit the existing and potential markets for plaintiffs' works.[7]

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[5] The nature of the copyrighted material here is to entertain through performance of the works. Reproductions of audiovisual performances, therefore, are less worthy of fair use protection than borrowings from informational works. *MCA, Inc.* v. *Wilson*, 677 F.2d 180 (2d Cir. 1981); see H.R. Rep. No. 83, *supra*, at 34. *Cf. Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (biographies); *New York Times Co.* v. *Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977) (indexes).

[6] Although extensive copying may not conclusively prevent a finding of fair use, it weighs heavily against such a finding, especially where the entire work has been reproduced for its intrinsic purpose. *Encyclopaedia Britannica Educ. Corp.* v. *Crooks*, 447 F. Supp. 243, 251 (W.D.N.Y. 1978). *Cf. Jartech, Inc.* v. *Clancy*, 666 F.2d 403, 407 (9th Cir. 1982) ("abbreviated copies of . . . films, *not for subsequent use and enjoyment*, but for evidence to be used in [legal] proceedings" held fair use (emphasis supplied)).

[7] As Professor Nimmer has written: "This factor . . . poses the issue of whether unrestricted and widespread conduct of the sort en-

(*footnote continued on following page*)

In his home, Griffiths was doing what thousands of other VTR owners were and are doing, namely, making unauthorized copies of copyrighted motion pictures and other audiovisual works.[8] While Griffiths may have considered his home recordings to have been innocent and isolated, innocence is no defense,[9] and "[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented."[10]

But they were not isolated and, taken together with similar actions by the multitudes of other VTR owners,

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(*footnote continued from preceding page*)

gaged in by the defendant (whether in fact engaged in by defendant *or* by others) would result in a substantially adverse impact on the *potential* market for or value of the plaintiff's work," M.B. Nimmer, *Nimmer or Copyright* § 13.05[A][4], at 13-65 (1982) (footnote omitted) (emphasis supplied); *Meeropol* v. *Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (court must consider "future market"); *Leon* v. *Pacific Tel. & Tel. Co.*, 91 F.2d 484, 487 (9th Cir. 1937) ("After all copyright is property, and an action will lie even if no damage be shown"). Moreover, "the plaintiff in a copyright case is presumed to suffer irreparable injury." *Encyclopaedia Britannica Educ. Corp.* v. *Crooks, supra*, 447 F. Supp. at 251.

[8] The brief of the Virginia Citizens' Consumer Council states that there are "VCR's [video cassette recorders] already purchased and in use in three million homes" and the market for future purchases is "potentially 30 million others." Brief of *Amici Curiae*, Virginia Citizens' Consumer Council, Inc., et al., at 12.

[9] In *Wihtol* v. *Crow*, 309 F. 277 (8th Cir. 1962), the defendant school teacher had rearranged plaintiff's copyrighted song and reproduced 48 copies of the rearrangement for his students' use. The court of appeals reversed the district court's finding of fair use and found infringement, notwithstanding that copies of plaintiff's song were not made on other occasions and notwithstanding that the defendant had no intent to infringe.

[10] H.R. Rep. No. 83, *supra*, at 35. To similar effect, Professor Nimmer states that a conclusion of fair use is justified only when the conduct of "all potential defendants, and without limitation as to the number of reproductions . . . and volume of users, would still not adversely affect the plaintiff's potential market". *Nimmer on Copyrights, supra*, § 13.05[E], at 13-84 (1982) (footnote omitted).

the effect on the existing and potential markets for and value of respondents' works must necessarily be adverse.[11]

The petitioners argue that the growing availability of video recording technology, coupled with some extemporaneous remarks made in connection with the Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (which provided *limited* copyright protection for sound recordings), establish that off-the-air reproductions of audiovisual works are permissible for private use. Petitioners' Brief at 32-39. To the contrary, the issue was never raised for congressional consideration and cannot be deemed resolved, especially in so sensitive an area of legislation. A broad limitation of copyright owners' rights cannot arise from such off-hand comments. More properly, it should be held that Congress has never addressed off-the-air reproduction of audiovisual works (a task it is now undertaking) and that this case must be judged by the existing law of fair use. See *Rose* v. *Lundy*,—U.S.—, 102 S.Ct. 1198, 1202-03 (1982).

Petitioners suggest that Griffiths should not be held to be an infringer because it would be impracticable to enforce a ban on home recording; hence, if only for this reason, home recording should be defensible as fair use. The petitioners' argument, however, can be made with equal force with respect to many instances of "theft of services"—yet it has never before been considered a ground for exculpation.

The element of privacy, which petitioners discuss, affects only the issue of an appropriate remedy, not liability. Because the lower courts in this case have not yet fashioned a remedy, it is premature to discuss how the element of privacy should be taken into account. Privacy, however, cannot be considered a defense to copyright infringement.

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[11] "Babies are born one at a time, but can result in overpopulation." From an early report on photocopying, quoted in Remarks of David Ladd, Register of Copyrights, to the Internationale Gesellschaft fur Urheberrecht, in Toronto, Canada (Sept. 23, 1981).

Indeed, with the advances of technology, the regulation of private uses promises to be a central issue in the future of copyright law; the delicate problems involved cannot be swept aside with a general privacy defense.

The current Register of Copyrights had this in mind in a recent address in which he discussed home recording of copyrighted works. Remarks of David Ladd, Register of Copyrights, to the Internationale Gesellschaft fur Urheberrecht, *supra*. Until relatively recently, he commented, nearly all infringements of copyrighted works were public and so visible at their source that enforcement of copyright presented no special problem. In view of new technologies, however, uses of copyrighted works often are not readily detectible and therefore not readily policeable. But, he concluded, we should not therefore "accept all home copying as lawless but uncontrollable, or lawful because it is uncontrollable." This is basically what the petitioners are suggesting, and it is obviously unacceptable.

Petitioners also suggest, Petitioners' Brief at 10, that "only" respondents Universal and Disney object to the unauthorized home recording of their works and should therefore be treated as aberrant. This is plainly wrong. The rights of AAP members and others in underlying copyrighted works are also infringed when VTR owners record motion pictures and television broadcasts. *See, e.g., Filmvideo Releasing Corp.* v. *Hastings*, 426 F. Supp. 690 (S.D. N.Y. 1976), aff'd, 668 F.2d 91 (2d Cir. 1982) (unauthorized exhibition of public domain motion picture infringes copyright in underlying novel); *Russell* v. *Price*, 612 F.2d 1123 (9th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980).

So, too, petitioner's assertion that "programming which could be registered for copyright but which is not" is "free for unchallenged home . . . recording," Petitioners' Brief

at 4,[12] gravely misstates the law. Registration is generally a condition to suit, 17 U.S.C. § 411(a), but is not a condition to copyright, *see* 17 U.S.C. §§ 302(a); 408(a); registration may be made after infringement and suit brought for infringement committed earlier. *See generally,* 2 M.B. Nimmer, *Nimmer on Copyright, supra,* § 7.16[A][1], [B][1].

Petitioners argue that it would serve the nation's communications policy to permit home video recording of televised programs. But instant reproduction by millions of owners of VTR equipment of copyrighted audiovisual works in the same mode and for the same purpose as that for which the works were produced in the first place cannot be permitted as a fair use without utterly destroying the rationale of the fair use doctrine. L.E. Seltzer, "Exemptions and Fair Use in Copyright," 24 Bull. Copyright Soc'y 215, 251 (1977). If such permission is to be granted, it must be granted by Congress as a statutory exemption.

In *Fortnightly Corp.* v. *United Artists Television, Inc.,* 392 U.S. 390 (1968), and *Teleprompter Corp.* v. *CBS,* 415 U.S. 394 (1974), mistakenly relied upon by the petitioners, *see infra,* this Court expressly stated that the reconciliation of copyright and communications laws is a job for Congress, not for the courts. When urged to "accommodate various competing considerations of copyright, communications, and anti-trust policy," this Court in *Fortnightly* wrote: "We decline the invitation. That job is for Congress." 392 U.S. at 401 (footnotes omitted). And in *Teleprompter,* this Court stated: "[d]etailed regulation of these relationships [within the communications industry], and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress." 415 U.S. at 414 (footnote omitted).

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[12] *See also,* Brief of Toshiba Corporation & Toshiba America, Inc. in Support of Petitioners at 17 & n.13 (erroneously equating unregistered material with "copyrightable" but not "copyrighted" material).

II.

Home recording is not to be excused as mere "enhancement" of the broadcaster's signal. Home recording is home copying.

Petitioners build their fair use claim, at least in part, on the argument that because video tape *recording* is but a mechanical step in video *reception,* no more than enhancing the viewer's capacity to receive the broadcast progam, the recording should be deemed a fair use, citing, by analogy, this Court's opinions in *Fortnightly Corp.* v. *United Artists Television, Inc., supra,* and *Teleprompter Corp.* v. *CBS, supra.*

Those cases are inapposite because they turn solely on the statutory interpretation of the term, "perform." The Court provided no discussion whatsoever of the meaning, history, scope, or pertinent factors of the fair use doctrine. If the defendants in *Fortnightly* or *Teleprompter* had recorded the works involved, they would have been liable for infringement. *Walt Disney Prods.* v. *Alaska Television Network, Inc.,* 310 F. Supp. 1073 (W.D. Wash. 1969) (*recording* of television programs by a cable system constituted infringement, even without distribution). So, too, under the 1976 Copyright Law, reproduction of broadcasts by a cable system will vitiate their compulsory license and subject them to liability for infringement. 17 U.S.C. § 111(f) (definition of simultaneous transmissions). A *limited* exception exists for *some* off-shore cable systems—but even here the exception is available only under stringent conditions. *Id.* § 111(e). Thus, reproduction is crucial to the issue of infringement and clearly distinguishes this case from *Fortnightly* and *Teleprompter.* Contrary to the petitioners' statement of questions presented, Petitioners' Brief at i, the issue in this

case is not *reception* of broadcasts, but *reproduction* of copyrighted works which have been broadcast.[13]

The question in *Fortnightly* and *Teleprompter* was whether there had been an infringement of the plaintiff's exclusive right to perform their copyrighted works in public, and the Court held that the CATV operator, unlike a broadcaster, does not broadcast or "perform," but on the contrary merely provides a well-located antenna with an efficient connection to the viewer's television set.[14] In elaborating on this distinction, the Court commented that broadcasters *select* the programs to be viewed while CATV systems do not, and that, unlike broadcasts, CATV systems simply carry the broadcast program *without editing*.

But unlike TV viewers and CATV systems which do *not* record broadcasts, Griffiths and his fellow VTR users *do* record and reproduce the copyrighted programs, thereby appropriating a right reserved to the copyright owner by section 106. Griffiths' reproductions are not used to enhance the broadcast, but as copies of particularly selected programs for later (and possibly repeated) viewing which may include editing of the programs, either by eliminating commercials or otherwise.

The simple fact is that VTRs are not just a means of reception; they are used for reproducing copyrighted materials. Home recording is home copying, no more or less

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[13] Moreover, the *Fortnightly* and *Teleprompter* decisions are not applicable under the new law. Cable systems are now subject to a compulsory license arrangement which requires them to pay *reasonable compensation* to copyright owners.

[14] Although the *Teleprompter* decision turned in part on the fact that CATV operators merely enlarged the receiving audience, that aspect of the case is distinguishable from this, in that the method used in *Teleprompter* was to relay signals, whereas the increased audience here results from impermissible reproductions of copyrighted works.

so than the unauthorized reproduction, at home, of a copyrighted song, or novel, or poem.[15]

III.

Williams & Wilkins was mistakenly relied on by the Trial Court and is mistakenly cited to this Court as being in conflict with the decision of the Court of Appeals below. The Court of Claims' decision in _Williams & Wilkins_, so heavily relied on by the Petitioners, affords no support to the fair use defense which they assert.

At the least, *Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), is clearly distinguishable on its facts.[16] The *Williams & Wilkins* case was a library case, not a user case, where it was suggested that the library was nothing more than the individual requestor's ministerial agent. The *Williams & Wilkins* case was deemed by the Court to be a "public interest" case where health and science were supposed to be at risk; it was not a "convenience" or entertainment case as here.[17]

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[15] Reproduction, even without distribution, can be infringement, M.B. Nimmer, *Nimmer on Copyrights, supra*, § 8.02[c], at 8-25; H.R. Rep. No. 94-1476, *supra*, at 61 (infringement occurs "where, for example, a printer reproduces copies without selling them").

[16] Sixteen Judges and Justices in all participated in the *Williams & Wilkins* case, splitting evenly 8-8. In the Court of Claims, the trial judge and three of the panel of seven Judges hearing the appeal found infringement, and the Supreme Court affirmed the Court of Claims decision, *per curiam*, by a vote of 4-4.

[17] The *Williams & Wilkins* court listed eight factors in all affecting their decision, including (1) that libraries provided single copies of articles in response to specific requests from medical researchers, ordinarily for their own use; (2) that requests were generally limited to single articles under 50 pages long; (3) that library copying was a long established practice; (4) that medical science would

(*footnote continued on following page*)

But more basically, the decision of the Court of Claims in *Williams & Wilkins* was a *provisional* decision, specifically stated to be an interim "holding operation" to permit the Congress to enact its preferred solution; this because the Court believed that the choice between copying without permission or licensed copying should be made by the legislature. 487 F.2d at 1360. Congress, in the 1976 Copyright Law, did enact its preferred solution and in so doing it *overruled* the Court of Claims' 4-3 split decision in at least two respects.

A.

The majority of the Court of Claims in *Williams & Wilkins* held that the massive systematic copying which the National Institutes of Health (NIH) and the National Library of Medicine (NLM) engaged in was excusable as a fair use. Congress, in enacting the 1976 Copyright Law, rejected that solution. Instead, it characterized the kind of copying that was done by NIH and NLM as "*systematic,*" 17 U.S.C. § 108(g) (2) (emphasis supplied), and it declared such copying "prohibited,"[18] except only in limited instances. See III. B., below.

(*footnote continued from preceding page*)

be harmed by discontinuing the practice; (5) that the paintiffs failed to prove damages; (6) that the term, "copy", in the 1909 statute was unclear; (7) that the then proposed 1976 Copyright Law suggested that photocopying would be fair use in some circumstances; and (8) that foreign laws permit photocopying in some similar instances. The court's decision rested on the relation of all of these factors as applied to the facts at hand. The opinion was expressly limited to those facts. 487 F.2d at 1362-63.

[18] S. Rep. No. 94-473, *supra*, at 70:

> While it is not possible to formulate specific definitions of "systematic copying", the following examples serve to illustrate some of the copying *prohibited* by subsection (g). [emphasis supplied]

(*footnote continued on following page*)

Thus, in effect, Congress *rejected* the fair use solution advocated by the Court of Claims majority.

B.

The House Committee on the Judiciary adopted and the Conference Committee accepted an amendment to section 108(g) (2) which prohibits "systematic" copying of section 108(d) material.[19] The amendment, the so-called "interlibrary arrangements proviso," provides in substance that nothing in section 108(g) (2) "prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies . . .does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."

(*footnote continued from preceding page*)

(1) A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons' requests for articles by otaining photocopies from the source library. [cf. NLM copying in the *Williams & Wilkins* case]

(2) A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions [cf. NIH copying in the *Williams & Wilkins* case]

(3) Several branches of a libarary system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and the one subscribing branch will reproduce copies of articles from the publication for users of the other branches.

[19] Section 108(d) extends protection to a copy of "no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work."

Thus, to the extent that NIH and NLM copying of Williams & Wilkins' journal articles for the purpose of interlibrary arrangements could have met the limitation of the "aggregate quantities" standard, it would have been permissible, but only as a section 108 library *exemption,* and not as a section 107 fair use. But copying by NIH and NLM and other libraries that does not meet the non-profit and other limitations of sections 108(a) through 108(e) is *prohibited.*

Williams & Wilkins therefore is not an authority to be cited as establishing any proposition affecting post-1977 copyright activities. Indeed, it is not even sound authority to be cited with respect to pre-1978 activities. The Senate Committee in its 1975 Report said that *Williams & Wilkins* "failed to signficantly illuminate the application of the fair use doctrine to library photocopying practices," S. Rep. No. 94-473, *supra,* at 71. Nimmer characterizes it as "seriously in error," *Nimmer on Copyright, supra,* § 13.05, at 13-83, and Seltzer asserts that it has been overruled, L.E. Seltzer, *supra,* 24 Bull. Copyright Soc'y at 238. The Court below was eminently correct in describing the decision as "singularly unpersuasive," 659 F.2d at 970, as placing "a strain upon the fair use doctrine," id. at 971, and in stating that it points in the direction of "a fundamental restructuring of the copyright system not justified by the statutory scheme or traditional notions of fair use," id.

Williams & Wilkins should therefore be interred, with respect, as a case of historical interest only, but with no relevance to the traditional doctrine of fair use.

Conclusion

The Court of Appeals correctly decided that the fair use doctrine does not sanction home video recording and correctly rejected *Williams & Wilkins* as pertinent authority.

Dated: October 25, 1982
New York, New York

Respectfully submitted,

CHARLES H. LIEB
(Counsel of Record)

JON A. BAUMGARTEN
DAVID S. KLAFTER

PASKUS, GORDON & HYMAN
45 Rockefeller Plaza
New York, New York 10111

Attorneys for Amici Curiae, Association of American Publishers, Inc. and Association of American University Presses, Inc.

Amicus Brief

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IN THE

Supreme Court of the United States

October Term, 1982

No. 81-1687

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF
THE AUTHORS LEAGUE OF AMERICA, INC.
AS *Amicus Curiae*

IRWIN KARP
Attorney for The Authors League of America, Inc., as Amicus Curiae
Woodland Drive
Port Chester, New York 10573
(914) 939-5386

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U.S. Copyright Act (17 U.S.C) ..... *passim*

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *Amicus Curiae*

Interest of the Authors League

The Authors League of Amercia is the national society of professional authors and dramatists. One of its principal purposes is to express the views of its 11,000 members in cases involving the rights of authors under the United States Copyright Act.

The League files this brief (with the parties' consent) because this appeal raises questions of enormous importance and grave concern to authors and dramatists. The Court of Appeals decision correctly decided that home-recording of broadcast motion pictures and television programs infringed rights granted under Sec. 106 of the Copyright Act. Reversal of that decision would destroy or greatly erode the rights of

novelists and playrights, as well as those of motion picture companies and television producers, and seriously impede the production and distribution of literary and dramatic works, and of films and television programs based upon them.

ARGUMENT

The Authors League agrees completely with the opinion and conclusions of the Court of Appeals, and we will not burden the Court with a prolonged reiteration of the analysis and authorities set out in its opinion. We do wish to discuss the consequences of the decision, or its reversal, for authors and playwrights.

The Effect of Home-Recording On Authors' Rights

Sec. 106 of the Copyright Act grants authors—writers and dramatists as well as motion picture producers—the "exclusive right(s) to reproduce (their) copyrighted works in copies or phonorecords." The Section does not limit the right of reproduction by the condition that it be "public", as is the case with the rights of performance and display. Nor do any of the specific limitations on the right of reproduction, in *Secs.* 110, 112, 115 and 118, permit unauthorized home-recording of broadcast motion pictures or television programs. Clearly, such home-recording violated the rights of the motion picture producer-respondents in this case, as it would violate the rights of a dramatist whose play was televised or transmitted by cable (an increasingly-popular means of presenting "live" stage performances to home audiences).

Modern technology, moreover, makes it impossible to draw any meaningful copyright distinction between reproduction of a copyrighted film or play, in cassettes, by a commercial pirate or by individuals in their homes. If a commercial pirate reproduced 10 videocassettes of Stephen Sondheim's acclaimed musical play SWEENEY TODD by taping the recent cable transmission of a stage performance, in his home, that would be an infringement of copyright under *Sec. 106(1)*. It

would be no less an infringement because the pirate distributed the copies, one to a customer, to 10 individuals for use in their homes. The essence of most infringements of the right of reproduction is the making of copies for distribution to ultimate consumers for use in their homes.

Furthermore, it makes no difference whether the piracy is undertaken for profit or for not-for-profit. If a school taped the SWEENEY TODD performance and distributed 10 copies to students without charge for use at home, it would violate the author's copyright. (cf. *Sec. 118(d)*).

The modern technology of the Betamax and other home video-recording machines makes it possible for 10, or 1,000 or 1,0000,000 individuals to by-pass the commercial pirate and reproduce video-cassettes of SWEENEY TODD or a Disney movie from a single television or cable broadcast. For the author, the copyright and economic consequences are the same as those of commercial piracy: 10, or 1,000 or 1,000,000 copies have been reproduced and placed in the possession of individuals—who make up the author's audience—without his/her permission and without any compensation. The home-counterfeiting of copyrighted plays, novels or films is no more justifiable because it is done at home and for the home-owner's sole benefit than would be the home-counterfeiting of $10 bills, performed on a sophisticated copying-machine equivalent of the Betamax for the benefit and enjoyment of the home-owner.

The Court of Appeals correctly ruled that home-recording of copyrighted works is not fair use. As it noted, the doctrine of fair use was not intended to permit the reproduction of entire works to satisfy the very purposes for which authors license the production and distribution of copies, and the broadcast and presentation of performances: to entertain individual readers and listeners.

The accumulation of home-recorded copies of a broadcast or cable transmission of a play, film or television program cannot satisfy the tests of fair use in *Sec. 107*, and particularly

cannot survive the test of "the effect of the use upon the potential market for or value of the copyrighted work."

The Economic Effect of Home-Recording on Authors

The accumulation of home-recordings of a performance of SWEENEY TODD or other plays or musicals has an adverse and pervasive effect on potential markets for that dramatic work, as it does on the potential market for any motion picture which is reproduced, by home-recording, in countless video-cassettes. Obviously, home-recording displaces the sales of commercially-produced cassettes licensed by the author or film company, and deprives those copyright owners of income from such sales.

Beyond that, however, home-recording diminishes many potential markets for films and plays. The broadcast which provided the means of counterfeiting was intended to be ephemeral, as it was prior to the perfection of affordable home-recording machines. An ephemeral presentation of any work—by broadcast, on the stage, or in motion picture theatre—does not exhaust the work's appeal to the audiences that view it. Countless movie-goers see the same film many times; television viewers, by the millions, watch re-runs of their favorite programs; theatre-goers will see revivals of their favorite plays in first-class, regional, stock and amateur performances, or in motion picture adaptations.

But thousands or hundreds of thousands of home-recordings of a play or film will have an enormous adverse effect on these potential markets for dramatic and literary works. They will prevent many plays, films and television programs from being revived, rerun or rebroadcast; and, in a vast number of instances, will reduce sharply the number of subsequent presentations in various media. All of this, without providing authors and producers of income from the source which diminished their potential markets . . . the unauthorized home-recordings of their copyrighted works.

The authors of plays and musical plays, who license performance, recording and broadcast rights in their works, will be directly injured. If they authorize a cable transmission of their plays, home-recording threatens them with serious loss of income from stock, amateur, regional and other theatrical productions of their works. Yet the granting of cable-transmission rights is an important means of raising funds to produce plays in a theater whose costs have escalated far beyond the rate of inflation.

Many authors who write films and television programs will be injured since a portion of their compensation is a share of the proceeds or profits derived by the motion picture or television producer from television and cable broadcasts of the works they write. Similarly, many authors of books and plays, who sell the motion picture or television rights in their works, will be injured since their compensation often is based, in part, on the income derived from the company which produced the film or television program based on their writings.

Another wide spread consequence of unauthorized and uncompensated home-recording of broadcast motion pictures, plays and television programs may well be the drying-up of financing for worthwhile films and television programs. While the few commercial blockbusters each year may be able to earn huge profits on their initial theatrical exhibition, this is not true of many films and programs that have significant dramatic, cultural or social value. Many of these do not recoup their costs of production from theatrical exhibition or network broadcasting. They must have access to all of the after-markets to repay their investors and to earn reasonable profits for the authors and producers who risked years of work, talent and capital to create them. The term "fair use" cannot, by any stretch of imagination or casuistry, be applied to the unauthorized recording of a production embodying the diverse talents, creative efforts and financial investment of authors, directors, actors, designers, cinematographers and many others.

The Congressional Solution

It is obvious that Congress did not exclude home-recording from the reach of the author's exclusive right of reproduction. It is equally obvious that Congress will enact some "solution" to the home-recording problem if this Court affirms the Court of Appeals decision. The public will have no dearth of champions in Congress to protect its interests. And it is likely that Congress will enact some method of compulsory licensing and payment to compensate authors and motion picture producers for the serious loss of income they will suffer from continued home-recording.

But if the Court were to reverse the Court of Appeals decision, authors and motion picture companies will be under a severe handicap in obtaining legislation that will provide reasonable compensation for the reproduction of their works by home recorders, and for the substantial loss of potential markets and of value of their works home-recording will increasingly cause.

The solution is one that Congress should enact. It is far less likely to be equitable if the Court does not follow the clear meaning of the Copyright Act and affirm the Court of Appeals decision.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc.
Woodland Drive
Port Chester, New York 10573

October 18, 1982

Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC., AND
WALT DISNEY PRODUCTIONS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF CBS INC. IN SUPPORT OF RESPONDENTS

Of Counsel:
GEORGE VRADENBURG III
HARRY R. OLSSON, JR.
CBS Inc.
51 West 52 Street
New York, New York 10019

LLOYD N. CUTLER
JOEL ROSENBLOOM
LOUIS R. COHEN *
DUANE D. MORSE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Amicus Curiae CBS Inc.

October 27, 1982

* Counsel of Record

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF CBS INC. IN SUPPORT OF RESPONDENTS

CBS Inc. ("CBS") [1] respectfully submits this brief *amicus curiae* in support of respondents.[2]

INTEREST OF AMICUS CURIAE

CBS broadcasts copyrighted feature films and television programs through five CBS-owned television stations and distributes these materials through the CBS Television Network to approximately 200 affiliated stations. Through

[1] CBS Inc. has no parent companies, subsidiaries (except wholly owned subsidiaries), or affiliates. (We construe the terms "parent companies," "subsidiaries" and "affiliates" to mean corporations whose shares are publicly traded and which, in the case of "parent companies," own a majority of the shares of a party; or, in the case of "subsidiaries" and "affiliates," a majority of whose shares are owned by a party.)

[2] The consents of the parties are on file with the Clerk.

the CBS/Fox company, CBS markets copyrighted feature films and television programs on prerecorded discs and tapes. CBS also produces and distributes phonograph records and tapes that embody copyrighted sound recordings and musical compositions, and CBS publishes copyrighted musical compositions. All of these activities would be adversely affected by a holding in this case that home tapers are free to appropriate intellectual property without compensating its owner.

Every broadcaster is directly threatened by petitioners' argument that the broadcasting of copyrighted materials makes them fair game for home copying. Motion picture and television producers invest substantial amounts to create copyrighted works. The revenues they receive from the initial broadcast of these works reflect only a portion of their value. The balance is realized through other authorized distributions, including theatrical and cable distribution, later broadcasts, and sales of prerecorded discs and tapes. If the broadcast audience is permitted to copy these works for later discretionary use, a substantial portion of the value that properly belongs to the copyright owner will be lost. To avoid such losses, copyright owners will either shift from broadcast to more secure media of distribution or charge broadcasters more for the use of their works in order to obtain compensation for unlicensed off-the-air copying. But since ratings services do not count and advertisers do not pay for home videotape viewing, the higher cost of obtaining works for broadcast will not be matched by additional advertising revenues.

Although audiotaping is not at issue in this case, the Court's decision may be vitally important to the record industry, in which CBS is a major participant. Uncompensated home audiotaping is having devastating effects on record companies, composers and performing artists, who receive royalties on each record sold. Home taping displaces hundreds of millions of dollars worth of record sales annually. It has led to fewer new releases, smaller

royalty payments, fewer opportunities for new artists, and less incentive for creative activity. The Court should not in this video case decide any question relating to audiotaping, which involves different legal, technological, and economic issues, but it should, we respectfully submit, take due note of the severe economic harm done to copyright owners by massive unlicensed home copying by the very people who are the intended audience for a copyrighted work.

Above all, CBS wants the copyright system to continue to provide economic incentives for the creative endeavors that are the lifeblood of its business. The copyright system provides those incentives by permitting creative people to charge for the use of their works. The extraordinary theory being pressed by petitioners—that a court should authorize free copying in order to give the intended audience broader access to copyrighted works—is fundamentally inconsistent with the property right that is recognized and protected by the copyright system.

SUMMARY OF ARGUMENT

Section 106(1) of the Copyright Act gives the copyright owner the exclusive right to "reproduce" or authorize the reproduction of his work. Home taping is reproduction: it is the creation of a tangible copy that can be viewed whenever, and as often, as the copier or anyone to whom the copier gives his copy may wish. Unauthorized creation of such a copy of a copyrighted work is infringement unless it is exempted by some other provision of the statute.

There is no such exemption. The district court discerned an "implied exemption" for home recording, but the statutory scheme clearly precludes implied exemptions, as even petitioners now concede. The broadcast of a copyrighted work does not eliminate its statutory protection, any more than the public performance of a play entitles a member of the audience to make a recording or other reproduction. This Court's CATV decisions—

which involved the question whether simultaneous cable retransmission is an infringing "performance," not the question whether making tangible copies is "reproduction"—are not in point.

Home taping is not "fair use." The theory of fair use, embodied in Section 107 of the Act, is that a second author should be permitted to make limited and creative use of a first author's work "for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research . . . ." The theory is not, as petitioners contend, that the intended audience for a copyrighted work should be allowed to make free copies whenever the courts think that would promote public "access."

Home video and audio taping bear no resemblance to limited and creative use by a second author of a first author's work. Home taping is massive replication—one copy at a time—of entire copyrighted works for the entertainment and convenience of their intended audience. Home taping is fundamentally a commercial activity even though the home copies are not resold: petitioners and others enjoy substantial profits from sales of machines and tapes used to make unauthorized "free" copies, and consumers who use petitioners' products save the cost of buying legitimate copies on which royalties are paid. The fact that copying is done in the home may have a bearing on the appropriate remedy, but it does not save the copying from being infringement.

The fragments of legislative history of the 1971 Sound Recording Amendment cited by petitioners do not indicate that home taping is fair use. They merely confirm that the 1971 Act (which created a copyright in a particular recording of a musical work, separate from the copyright in the composition itself) was intended to deal with commercial piracy and not home taping. The thorough revision of copyright law in 1976 contains nothing in its text or its legislative history that suggests that Congress intended home taping of entire copyrighted works to be

freely permissible, either as fair use or on any other theory.

The manufacture and sale of defendants' machines is contributory infringement. The principal use of the recording capacity of a VTR is to make copies of copyrighted materials. That use is, as the court of appeals said, "intended, expected, encouraged, and the source of the product's consumer appeal." [3] Petitioners' speculation that a significant amount of copying is of unprotected materials is contrary to their own evidence.

ARGUMENT

I. Home Recording of Copyrighted Works Is "Reproduction" in Violation of the Exclusive Right of the Copyright Owner To Reproduce his Work.

This case involves unauthorized copying of copyrighted works, which is a plain violation of a right reserved by statute to the copyright owner. Petitioners seek to obscure that fact by calling the activity "time-shifting" and inventing exceptions not found in the language of the Copyright Act. But the statutory scheme leaves no room for petitioners' linguistic legerdemain.

A. Unauthorized home taping violates an exclusive property right granted by statute to the copyright owner.

Section 106 of the Copyright Act of 1976 (the "1976 Act") [4] grants to the copyright owner certain exclusive property rights that are limited only by the detailed and specific exceptions contained in Sections 107-118. Violation of any of these exclusive rights is infringement. 17 U.S.C. § 501. Among these rights is the right "to reproduce the copyrighted work in copies or phonorecords" or to authorize its reproduction. 17 U.S.C. § 106(1).

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[3] *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963, 975 (9th Cir. 1981).

[4] Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (Supp. IV 1980)).

Home taping is reproduction. The videotape recorder ("VTR") makes a tangible copy of the copyrighted program. It "fixes" the work on magnetic tape, giving the user the power to view and perform the copyrighted work at his convenience, as often as he wishes. The legislative history of the 1976 Act makes clear that "fixation [of a work] in tangible form [that is] 'sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration'" is reproduction within the meaning of Section 106.[5]

Petitioners attempt to disguise the obvious by calling home taping "time-shift reception." But time-shifting is the very essence of reproduction. Copies of books, of phonograph records, of motion pictures, or of television programs enable people to enjoy these works at their convenience, free from externally imposed time constraints. That is what makes copies—and the copyright owner's exclusive right to make them—valuable. The creation of an unauthorized personal copy of a broadcast work or a phonograph record, enabling the home taper to determine the time of its performance, violates that right and is infringement, 17 U.S.C. § 501, unless it is elsewhere excused.

B. There is no special exception for home taping outside the doctrine of fair use.

The only exceptions to the rule that unauthorized reproduction of a copyrighted work is infringement are those specified in Sections 107-118 of the 1976 Act. The district court discerned an "implied exemption" for home recording based upon the legislative history of the 1971 Sound Recording Amendment,[6] but the court of appeals

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[5] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 62-63, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5675-76.

[6] Pub. L. No. 92-140, 85 Stat. 391. That legislative history is discussed in Part IIC of this brief.

correctly recognized that the statutory scheme precludes the existence of unstated exceptions to the scope of copyright.[7] Petitioners apparently concede as much and have abandoned the argument that the 1976 Act contains any special exemption—explicit or implicit—for home taping.

Nor can home taping be justified on the ground that, by permitting his work to be broadcast, the copyright owner relinquishes his exclusive right to reproduce or authorize reproduction of the work. It is a fundamental principle of copyright that a public performance of a work, including a broadcast performance, does not reduce the copyright owner's rights.[8] As the court said in rejecting a similar argument in *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156, 1180 (W.D.N.Y. 1982):

> "The plaintiffs' choice of media . . . does not abrogate their rights as copyright holders. Similarly, whether plaintiffs knew and expected that the broadcasts would be received free of charge does not change their status as copyright holders or mean that they have abandoned their rights under the copyright laws."

The copyright owner retains all rights in a work despite its broadcast, including the right to reproduce it in copies

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[7] *Universal City Studios, Inc. v. Sony Corp. of America, Inc.*, 659 F.2d at 965-69. Professor Nimmer, America's foremost authority on copyright, concludes in a forthcoming article that "there is not and never has been an exemption from copyright liability for audio home recording." Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the* Betamax *Myth*, 68 Va. L. Rev. 1505, 1506 (Nov. 1982).

[8] *See, e.g., Ferris v. Frohman*, 223 U.S. 424, 435 (1912) (public performance of a play); *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946) (public performance of a song); *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963) (simultaneous public delivery and radio and television broadcast of a speech); *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358, 362 (D. Mass. 1934), *modified on other grounds*, 81 F.2d 373 (1st Cir. 1935), *cert. denied*, 298 U.S. 670 (1936) (radio broadcast of a script).

or phonorecords, and petitioners do not seriously dispute that fact.

Petitioners invoke the Court's CATV cases, *Fortnightly Corp. v. United Artists Television, Inc.*, 382 U.S. 390 (1968), and *Teleprompter Corp. v. CBS Inc.*, 415 U.S. 394 (1974), but they are not germane. Those cases held that the simultaneous retransmission of a broadcast television performance of a copyrighted work did not amount to an infringing secondary performance of that work but was merely a passive means of enhancing subscribers' ability to receive the broadcast performance.[9] *Fortnightly* and *Teleprompter* did not hold that any of the copyright owner's exclusive rights are lost through broadcast, did not involve copying, and have no application where the issue is not "performance" but "reproduction" in violation of an entirely different statutory right of the copyright owner.

The distinction was recognized and applied in *Walt Disney Productions v. Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969). There CATV operators sought to invoke *Fortnightly* to justify recording broadcast programming for shipment to and delayed carriage on their cable system in Alaska. The court dismissed the analogy because the defendants had introduced a "time or storage element" that was lacking in *Fortnightly*:

> "The 'recording' system used by the defendants captured the impulses and put them in such form that they were capable of being perceived, with proper equipment, innumerable times, and after any passage of time, subject only to the limitations imposed by the characteristics of the plastic tape on which the iron particles were mounted."

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[9] In 1976 Congress effectively overruled *Fortnightly* and *Teleprompter* by creating a statutory mechanism whereby cable operators must obtain a compulsory license and pay royalties to retransmit broadcast works or be liable as infringers. *See generally* 17 U.S.C. § 111.

Id. at 1075.[10] By capturing the broadcast works on tape for later use, the court said, the defendants had violated the copyright owner's exclusive right to make or authorize copies. It was irrelevant that the copying had been necessary to permit retransmission of the copied works on their cable system or that the defendants had not distributed the copies in competition with the copyright owners.

Like *Walt Disney*, this case involves reproduction—the fixation of entire copyrighted works for later performance—not simultaneous retransmission. Petitioners say that home taping is like retransmission in that it permits copyrighted works to reach a wider audience than would otherwise be the case, but the same could be said of unauthorized printing of books, manufacture of counterfeit records, or any other form of copying. Congress has granted the copyright owner the exclusive right to reach that wider audience by any means that involves reproduction, and it is the act of reproduction that is the infringement.

The contention that the First Amendment protects unauthorized copying of a copyrighted work has been routinely and repeatedly rejected.[11] Even if the right to receive broadcast signals is regarded as constitutionally protected against some kinds of interference,[12] there is no constitutional right (beyond the scope of fair use) to

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[10] The Court's opinion in *Teleprompter* noted this temporal limitation: "The reception and rechanneling of these signals for *simultaneous* viewing is essentially a viewer function. . . ." 415 U.S. at 408 (emphasis supplied).

[11] *See, e.g., Roy Export Co.* v. *CBS Inc.*, 672 F.2d 1095, 1099-1100 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3254 (Oct. 4, 1982); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

[12] Brief for the Petitioners ("Pet. Br.") 25.

make an unauthorized copy of someone else's copyrighted work. The First Amendment no more protects the unauthorized reproduction of a broadcast work, such as the television program version of *Roots*, than it would the unauthorized reproduction of the book itself. Both are the property of the copyright owner, and "[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property." [13] Similarly, the Communications Act policy of promoting the fullest use of the broadcast spectrum has no application here. Respondents do not seek to limit either broadcast or reception of their works; they ask only that the programs broadcast and received not be reproduced without authorization.

Given the structure of the statute and the absence of any special exemption for home recording, petitioners must justify their activities, if at all, by showing that they fit within one of the statutory exceptions in Sections 107-118. The only one that has any possible relevance to this case is the fair use exception codified in Section 107.

II. Home Reproduction of Copyrighted Works Is Not Fair Use.

Home taping is massive, unauthorized, and uncompensated reproduction of copyrighted works for the benefit of the very audience at which the creators of those works are aiming. Unauthorized home copies are direct substitutes for prerecorded discs or tapes of the same programs, movies, or recorded music. Home taping thus displaces sales of copyrighted works, reduces their value to their

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[13] *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979). *See Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1160-71 (9th Cir. 1977). *Cf. United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974) ("we fail to see as any protected first amendment right a privilege to usurp the benefits of the creative and artistic talent, technical skills, and investment necessary to produce a single long-playing record of a musical performance.").

authors, and decreases the economic incentives for authors to create. As the court of appeals said, a finding of fair use under these circumstances would "*stretch*[] *fair use beyond recognition.*" 659 F.2d at 970 (emphasis in original).

A. The fair use doctrine serves a limited purpose that bears no relation to this case.

Fair use is a privilege in a second author (or other creator) to make limited use of a first author's copyrighted work without his consent.[14] It is a limited privilege to trespass on the intellectual property of another, and it grows out of a recognition that society's interest in promoting "the Progress of Science and useful Arts" is sometimes best served by allowing a second author to build upon a predecessor's creativity.[15] The courts developed and Congress has codified the fair use doctrine "to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." [16]

But the societal interest in promoting creativity that is the *raison d'être* of the fair use doctrine also sets its bounds. As an excused intrusion on literary property, fair use can be no broader than the need from which it springs. The courts have refused to approve uses that do not serve any creative or productive end,[17] or that tend

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[14] *See Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

[15] *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

[16] *Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980), quoted in *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 83 (1st Cir. 1981).

[17] *See, e.g., Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (reproduction of stock market newsletter not fair use); *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282 (8th Cir. 1939) (reproduction of song choruses in

to undercut the economic incentives for the first author's creativity.[18]

The doctrine of fair use is not a device to enable the intended audience to make free copies of a copyrighted work whenever a court thinks society would benefit from wider distribution. "The fair use doctrine is not a license for . . . theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance."[19] To the contrary, the fair use doctrine *assumes* that the copied work is accessible to the public and asks whether the preparation of a *second* work "requires some use of prior materials

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songbook not fair use); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (off-the-air taping of educational television programs not fair use); *Quinto v. Legal Times, Inc.*, 506 F. Supp. 554 (D.D.C. 1981) (publication of copyrighted article not fair use); *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723 (S.D.N.Y. 1974), *rev'd on other grounds*, 551 F.2d 484 (2d Cir. 1977), *cert. denied*, 431 U.S. 949 (1978) (performance of copyrighted silent film not fair use).

[18] *See, e.g., Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d at 62 (fair use rejected because "ABC did foreclose a significant potential market to Iowa"); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d at 96 (fair use rejected because the challenged use had the intent and effect of "fulfilling the demand for the original work"); *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (fair use inapplicable if "the market for republication or for sale of motion picture rights [to the Rosenberg letters] might be affected by the infringing work"); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. at 1168 (off-the-air copying of educational broadcasts not fair use since "these practices tend to diminish and prejudice the potential market for these works"). *Cf. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d at 1169 n.13 (infringement found where "the value of the . . . series, particularly as to its merchandising potential, was sizeably diminished after the McDonaldland commercials appeared.").

[19] *Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d at 61.

dealing with the same subject matter."[20] The doctrine allows that "use of prior materials" where to do so will serve society's interest in encouraging the second author's creative efforts without limiting the potential market for the first work.

Petitioners ask the Court to depart several miles from traditional fair-use analysis. They would have the Court balance, in each case, the copyright owner's interest in the protection of his property against society's interest in the greater "access" that would result from allowing free copying. But the fair use doctrine is not a roving commission to weigh private incentives against public access, or a general license for the courts to prefer the audience to the author.

It is the copyright system itself that serves society's overriding interest in making creative work available to the public. The system provides economic incentives for creative work, and it protects against unauthorized use so that authors need not fear to make their works public. Congress codified the fair use doctrine for application in cases where a finding of infringement would inhibit rather than encourage creativity. Petitioners' "access" argument is like saying that, after a toll bridge has been built, the "public interest in access" to the bridge would be better served by eliminating the tolls. It is an argument that would destroy the economic foundation of the copyright system.

B. Home taping does not satisfy any of the criteria of fair use.

Congress codified the fair use doctrine in Section 107 of the 1976 Act. Section 107 states that fair use means use "for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research. . . ." Making a personal copy of the whole of a feature film

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[20] *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 307.

or popular record, solely for one's own convenience and entertainment, does not remotely resemble anything on that statutory list.

In addition to listing examples, Section 107 codifies the four factors the courts have looked to for guidance in determining whether a challenged use is fair. *Meeropol v. Nizer*, 560 F.2d at 1068-69.[21] Analysis of the use in this case under the four factors listed in Section 107 and the case law from which they were drawn shows conclusively that home taping is not fair use.

The first factor—the purpose and character of the use—has been held to exclude from fair use so-called intrinsic uses of a copyrighted work.[22] "Fair use" has

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[21] Section 107 restates the judicially developed fair use doctrine, without enlargement, restriction or change. S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5679.

[22] The only case claimed by petitioners to hold an intrinsic use of a copyrighted work to be fair use is *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975), a decision whose rationale the court below termed "singularly unpersuasive." 659 F.2d at 970. *Williams & Wilkins* involved copying by the National Institutes of Health and the National Library of Medicine of isolated articles from medical and scientific journals to fill single requests of library patrons, generally scientists and physicians. The Court of Claims found this to be a fair use, in part because it was "convinced that medicine and medical research will be injured by holding these particular practices to be an infringement." 487 F.2d at 1354. This Court's 4-4 affirmance, of course, lacks any precedential force.

Whether or not *Williams & Wilkins* represents a proper application of the fair use doctrine in the context of copying for scholarly purposes—and CBS believes it does not—it does not authorize the wholesale appropriation of copyrighted works solely for convenience and entertainment. Moreover, the *Williams & Wilkins* problem apparently has been resolved legislatively by Sections 108(a) and (d) of the 1976 Act. Those Sections provide that, in most situations, it is not an infringement of copyright for a library to reproduce no more than one copy of a journal article if the copy becomes the

always meant creative use; use that is incidental to some distinct, productive endeavor such as parody,[23] scholarship,[24] research,[25] biography,[26] news reporting,[27] criticism[28] and the like.[29] Copying a work to use it for its intended purpose has never been held to be fair use because it supplants demand for the copyrighted original

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property of the requesting patron and the work is to be used for private study, scholarship or research. This fact suggests Congress disagreed that the use at issue in *Williams & Wilkins* was a fair use and therefore found it necessary to construct an exception beyond the limits of the fair use doctrine.

[23] *See, e.g., Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (song parodies); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (same); *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955) (movie parody).

[24] *See, e.g., Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (use of movie frames in book presenting a theory of President Kennedy's assassination).

[25] *See, e.g., G. R. Leonard & Co. v. Stack*, 386 F.2d 38, 39 (7th Cir. 1967) (use of copyrighted rate directory to verify and augment defendant's independent compilation).

[26] *See, e.g., Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966) (reproduction of magazine articles in biography of Howard Hughes); *Meeropol v. Nizer*, 361 F. Supp. 1063 (S.D.N.Y. 1973) (reproduction of private letters in book about Julius and Ethel Rosenberg).

[27] *See, e.g., Italian Book Corp. v. American Broadcasting Cos.*, 458 F. Supp. 65 (S.D.N.Y. 1978) (reproduction of performance of copyrighted song in news coverage of a parade).

[28] *See, e.g., Consumers Union of United States, Inc. v. Hobart Mfg. Co.*, 189 F. Supp. 275 (S.D.N.Y. 1960).

[29] *See, e.g., Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980) (comparative advertising); *Keep Thompson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 1978) (partial use of campaign song in opponent's political advertisement); *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977) (index of plaintiff's *work*).

and reduces its value.[30] Professor Nimmer has termed this distinction the "functional test": if the defendant's use performs the same function as the copyrighted work, it is infringement. 3 M. Nimmer, *Nimmer on Copyright* § 13.05[B] at 13-65-72 (1982).[31] Obviously, home videotaping of creative works in their entirety solely for the convenience and enjoyment of the VTR owner lacks the fundamental productive character of a fair use.

The second factor—the nature of the copyrighted work—also argues against a finding of fair use here. Because the fair use doctrine is designed to effect an accommodation between the author's exclusive right to charge for the use of his work and the public interest

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[30] *Compare Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d at 1177 (comparative advertising held fair use since "we are simply unable to find any effect—other than possibly de minimis—on the commercial value of the copyright"); *Berlin v. E.C. Publications, Inc.*, 329 F.2d at 543 (parody held fair use since no claim of passing off or "that defendants' parodies might satisfy or even partially fulfill the demand for plaintiffs' originals"); *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. at 146 (use of photos to illustrate theory held fair use since "no competition between plaintiff and defendants"), *with Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d at 62 (broadcast of film held not fair use because "ABC did foreclose a significant potential market to Iowa"); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d at 96 (copying of stock market reports for distribution to investors held not fair use because the use had "the obvious intent, if not the effect, of fulfilling the demand for the original work"); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. at 1169 (off-the-air taping and distribution to schools of educational films held not fair use because these practices "tend to diminish and prejudice the potential market for these works").

[31] The Senate Committee on the Judiciary echoed this view in its 1975 Report on the proposed revision of the Copyright Act: "With certain special exceptions (use in parodies or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975).

in allowing other authors to build on that work, the scope of fair use depends on the extent to which the copyrighted work lends itself to productive use by others.[32] Informational works, which lend themselves readily to productive use, are much more likely to be held subject to fair use than are purely imaginative or creative works, which do not.[33] Obviously, the works most often recorded by VTR owners (copyrighted television programs and feature films) and those most often copied on audiotape recorders (popular records) are creative works designed primarily to entertain.[34] The Court should be particularly reluctant to characterize their unauthorized use as fair.

The third factor—the amount and substantiality of the portion used—is by itself sufficient to preclude a finding of fair use in this case. The home taper reproduces an entire copyrighted work, not just a portion of it. Petitioners attempt to play down this factor by arguing that "the brief duration of the VTR recording counterbalances its 'amount and substantiality'," Pet. Br. 21 n.32, but that argument is clearly beside the point. The VTR owner records the entire work because he intends it to become an exact substitute for the copyrighted original. How long he keeps the unauthorized copy and how often he uses it (matters over which the copyright owner has

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[32] *See Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 307. *See also Meeropol v. Nizer*, 560 F.2d at 1068-71.

[33] *See Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. at 733; 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A][2] at 13-61 (1982). It is true, of course, that parodists sometimes make productive use of creative or imaginative works. *See, e.g., Berlin v. E.C. Publications, Inc.*, 329 F.2d 541. This case, however, involves nonproductive copying rather than parody.

[34] Petitioners' own survey indicates that entertainment shows account for over 80 percent of the programs recorded by Betamax owners. Crossley Surveys, Inc., *A Survey of Betamax Owners*, R. 2353, DX OT, Table 20.

no control) have no bearing on his right to make the copy in the first place.[35]

The fourth factor—the effect of the use on the potential market for or value of the copyrighted work—reveals the fallacy of petitioners' fair use argument. Far from being the harmless activity that petitioners make it out to be, home taping is essentially a commercial activity whose economic effect is no different from that of commercial piracy: by creating an exact substitute for a prerecorded copy, home taping destroys, *pro tanto*, the potential market for legitimate copies of the recorded work.[36] And while the copying activities of any indi-

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[35] *See, e.g., Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) ("excessive copying precludes fair use"); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 310 ("the fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material set down by another cannot satisfy that standard"); *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962) ("it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be "fair use").

Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, is not to the contrary. That case involved the reproduction of the cover of TV Guide magazine in a comparative advertisement for the defendant's competing publication. In the first place, the court rejected "Triangle's argument that the cover of TV Guide is *separately* copyrighted and that therefore Knight-Ridder ha[d] reproduced an entire copyrighted work." *Id.* at 1177 n.15. Moreover, Knight-Ridder used the cover for comparative advertising, not for its intrinsic purpose of covering a magazine. *Id.* at 1176 n.12.

[36] *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. at 1171, is instructive in this regard. There, the court found that off-the-air taping and reproduction of educational television programs by a nonprofit educational organization was not fair use even though the unauthorized copies were not sold:

> "In this form, these videotape copies plainly had the effect of fulfilling a demand for the original work, . . . since without the videotape copies, these works would not have been available at all. This use causes harm to the plaintiffs' copyright, for even if the use was insufficient to warrant purchase . . ., defendants

vidual VTR or audiotape recorder owner may have only a small effect, that effect is multiplied thousands of times by the activities of other owners. In the area of audiotaping, the cumulative activities of individual home tapers cost copyright owners hundreds of millions of dollars in lost record and tape sales annually.[37] Congress has made clear that the fair use doctrine does not sanction such displacement:

> "When the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection. Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." [38]

Petitioners assert that home videotaping does as much good as harm to copyright owners because it enables broadcast works and their sponsors to reach people who were within the intended audience of the broadcast from which the recording was made but were unable or unwill-

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could have leased or rented these three works from the plaintiffs for classroom use. Thus, the videotape use here directly interferes with the marketability of plaintiffs' copyrighted works . . . and the cumulative effect of this videotaping tends to diminish and prejudice the potential market for these works." *Id.* (citations omitted).

[37] In 1980, home tapers recorded the equivalent of approximately 455 million albums. Warner Communications, Inc., *A Consumer Survey: Home Taping* 20 (1982). It has been estimated conservatively that nearly 40 percent of home taping activity is in lieu of the purchase of prerecorded discs or tapes and that the industry lost over a billion dollars in 1981—$900 million in lost sales and $150 million due to artificially depressed prices—as a result. Statement of Alan Greenspan re Amendment 1333 to S. 1758 Before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 5 (April 21, 1982).

[38] H.R. Rep. No. 2237, 89th Cong., 2d Sess. 64 (1966). *See* S. Rep. No. 983, 93d Cong., 2d Sess. 118 (1974). *See also Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156.

ing to view it off the air. But ratings services do not count instances of viewing of home tapes and advertisers do not pay for such viewers. Given the "pause" and "fast-forward" capabilities of petitioners' machines and the other factors that make VTR viewers less valuable to sponsors, it is the sheerest speculation that advertisers will pay for VTR viewing in the future, let alone pay enough to compensate for the displacement of the market for legitimate copies.

People unable or unwilling to watch a first broadcast constitute a separate and important potential market for the copyrighted work. They may be part of the audience for a subsequent broadcast or potential purchasers of prerecorded tapes or discs. *Congress gave the right to exploit that market to the copyright owner*, and that right should not be destroyed by the courts merely because technological advances have now given members of that potential market the physical capability to seize the work without paying anything for it.

Even if there were evidence that home taping produces some offsetting benefits to the copyright owner, that would not excuse the taking of his property. The Second Circuit made this clear in *Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, when it rejected the defendant's argument that its unauthorized broadcasts of portions of the plaintiff's copyrighted film in connection with coverage of the 1972 Olympics were excused because the film's market value had been enhanced by the broadcasts. Granting that premise, the court said:

> "Nevertheless, we believe that ABC did foreclose a significant potential market to Iowa—sale of its film for use on television in connection with the Olympics. . . . When ABC telecast without purchasing the film, it usurped an extremely significant market. Iowa had no right to insist that the network use its film, but its copyright entitled it to attempt to exploit the commercial market controlled by ABC, and, if it could

not, to withhold permission to use the film in that market. *Accord*, 3 *Nimmer on Copyright* § 13.05 [B]."

621 F.2d at 62. We are dealing not with a regulatory scheme in which the burdens and benefits of each unauthorized use are to be weighed, but with property rights that the copyright owner is entitled to exploit as he sees fit. It has long been settled that violation of those rights is infringement, regardless of any incidental benefit the violation may produce.[39]

Nor, finally, is it material to the question of fair use that the unauthorized reproduction at issue in this case takes place in the home. That fact may, for reasons that have nothing to do with copyright or fair use, affect the appropriateness of certain remedies that ordinarily are available under the statute, but it does not change the legal stataus of home taping. The Court would have no difficulty holding a commercial pirate who manufactured unauthorized videotapes or phonorecords liable for infringement even if his factory was in his basement and he sold to others "only for private use." The fact that here the infringer sells the machine and lets his customers do the actual copying does not make the copying fair use.[40] Decentralized infringement is, nevertheless, infringement.

C. The 1971 legislative history does not convert otherwise impermissible copying into fair use under the 1976 Act.

Petitioners attempt to escape the fact that home taping does not meet the statutory criteria for fair use by sug-

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[39] *See, e.g., Chappell Co. v. Middletown Farmers Market & Auction Co.*, 334 F.2d 303, 305 (3d Cir. 1964); *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776, 780 (D.N.J. 1923).

[40] *Cf. Elektra Records Co. v. Gem Electronic Distributors, Inc.*, 360 F. Supp. 821, 824-25 (E.D.N.Y. 1973) (duplication of prerecorded audiotapes held infringement despite the fact that the copies were made by individual customers).

gesting that Congress nevertheless intended the activity to be treated as fair use. The legislative history, however, does not support that conclusion.

Petitioners' argument is based entirely on three statements made during House consideration of the 1971 Sound Recording Amendment (the "1971 Amendment"),[41] a stop-gap measure that amended the 1909 Act to provide immediate relief against unauthorized commercial manufacturing of phonograph records, which had reached epidemic proportions by 1971.[42] Petitioners' attempt to find in these statements a general congressional intent that all home taping be treated as fair use fails on several accounts.

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[41] Pub. L. No. 92-140, 85 Stat. 391. To make clear that the bill was aimed at record piracy, not at amateur recording for personal use, the Assistant Register of Copyrights testified that the bill would not cover tape recording in the home by a child and expressed the view that home taping generally could not be controlled or restrained. *Prohibiting Piracy of Sound Recordings: Hearings before Subcomm. No. 3 of the House Judiciary Comm. on S. 646 and H.R. 6297*, 92d Cong., 1st Sess. 22-23 (1971). Similarly, the House Report on the 1971 Amendment stated that ". . . it is not the intention of the Committee to restrain home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it." H.R. Rep. No. 487, 92d Cong., 1st Sess. 7, *reprinted in* 1971 U.S. Code Cong. & Ad. News 1566, 1572. And in a colloquy on the floor of the House, Representative Kastenmeier, the Chairman of the House Committee, affirmed that the bill covered duplication "for commercial purposes only," and expressed the view without citation or explanation that home taping by a child would be fair use since "[t]he child does not do this for commercial purposes." 117 Cong. Rec. 34,748-49 (1971).

[42] *See, e.g.*, 117 Cong. Rec. 12,763 (1971) (remarks of Senator McClellan). The 1909 Act afforded no copyright protection to particular recordings of copyrighted songs. Since neither record companies nor recording artists could sue for infringement, and since the interests of songwriters were generally too small to justify the expense of an infringement action, commercial pirates operated virtually unchecked until the 1971 Amendment became law.

First, the 1971 legislation did not purport to codify, enlarge, restrict, or otherwise affect the doctrine of fair use in any way. It was intended to address the specific problem of commercial record piracy by giving record companies a "sound recording" copyright so that they could pursue the pirates as infringers. It contained no reference whatever to the fair use doctrine and no indication that home recording or any other activity was to be treated as fair use.[43] Remarks in the legislative history concerning fair use would offer no interpretative guidance, because the legislation was not on that subject.

Second, two of the three statements cited by petitioners do not use the words "fair use" or appear to refer to that doctrine. The Assistant Register's remarks seem more consistent with the view that a copyright owner's right to prevent copying would be difficult to enforce against a home taper than with the idea that the activity is permissible, as fair use or otherwise. And the House Report simply indicates that the Committee, perhaps motivated by the same consideration, did not intend the bill itself to restrain private noncommercial taping activity. Only Representative Kastenmeier used the words "fair use", and he did so in the heat of debate and with reference to a child engaged in a hobby. This is surely a skimpy basis for inferring that Congress as a whole thought the home taping industry was engaged in fair use.

In any event, the legislative history of the 1971 Amendment is irrelevant to the question whether home taping is fair use today. The 1909 Act and its 1971 Amendment

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[43] Musical compositions embodied in phonorecords had enjoyed copyright protection, including the exclusive right to make discs or tapes, since 1909, *see, e.g., Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966), and the 1971 Amendment did not purport to limit that protection in any way. A home taper necessarily copies the musical composition. The legal status of uncompensated copying of copyrighted musical compositions, prohibited since 1909, was of course not affected by remarks in the 1971 legislative history of a statute that provided a new and additional form of copyright protection.

were superseded by the 1976 Act, which fundamentally changed the system of property rights and exceptions at issue in this case. In particular, it was in 1976 that the copyright owner's exclusive right to "reproduce" was separated from his right to "distribute" copies, making it clear that reproduction without distribution nevertheless is infringement. 17 U.S.C. §§ 106, 501. Sound recordings —which were the subject of the 1971 Amendment—and audiovisual works—which are at issue in this case—are treated separately and afforded different degrees of copyright protection. 17 U.S.C. §§ 106, 114. The provisions of the 1971 Amendment—which petitioners would like the Court to believe were simply reenacted in 1976—have been replaced by language in four separate sections of the 1976 Act. *See* 17 U.S.C. §§ 101, 102(7), 106 (1), (2) & (3), and 114. And the fair use doctrine is now codified in Section 107, which of course makes no reference to home taping.

Congress said nothing in 1976 that indicates home taping activity was intended to be exempt or to be treated as fair use under the new act. To the contrary, both the Senate and House Committee reports state plainly that the 1976 Act was "not intended to give [photocopying or taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use." [44] And the Senate Committee report strongly implies that Congress did not consider home taping to be fair use.[45]

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[44] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5679; S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975).

[45] Noting that schools located in time zones several hours removed from the point of origin of educational television transmissions might need to record that programming for delayed presentation to students, the Committee stated that it believed such recording to be a fair use. But the Committee was careful to point out that it "[did] not intend to suggest, however, that off-the-air recording for convenience would under any circumstances, be considered 'fair use'." *Id.* at 66.

III. Petitioners Are Liable as Contributory Infringers.

The Second Circuit has stated the rule of contributory infringement as follows:

> "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."

Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted). Both the lower courts and the petitioners have acknowledged that this is an accurate statement of the rule.[46] The only question before the Court is its proper application to this case.

There can be no question that petitioners induced, caused or materially contributed to the infringement of respondents' copyrighted works. They designed, built, promoted and sold the home VTR for the primary purpose of recording broadcast programs. The VTR owners who reproduced respondents' copyrighted works merely used that instrumentality for its obvious purpose. Petitioners' actions clearly played an important part in the infringement, and they do not seriously contend otherwise.

Instead, petitioners argue that they cannot be held liable as contributory infringers because they had no knowledge of or intent to facilitate the infringing activity. They contend that the VTR is but a staple item of commerce, capable of substantial noninfringing use, and that they had no way of knowing that any particular customer would use it to reproduce copyrighted works. But both the premise and the conclusion of this argument are wrong.

The premise that there are substantial noninfringing uses for the home VTR is incorrect. VTRs are designed

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[46] *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429, 459 (C.D. Cal. 1979); *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F. 2d at 975; Pet. Br. 43.

specifically to make tapes of audiovisual works received off the air or by cable. Indeed, unless a VTR owner spends several hundred dollars extra to purchase a videotape camera, this is virtually the only use of his machine's "record" capability.[47] Since almost everything broadcast on television is an audiovisual work in which "copyright protection subsists," [48] use of a VTR for its intended purpose of recording broadcast programs is almost always infringement.[49]

Nor is it significant that petitioners were able to obtain the statements of various organizations—mostly sports leagues, religious associations and nonprofit educational groups [50] that have no prospect of marketing copies

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[47] Petitioners' argument that the ability of VTRs to play prerecorded videocassettes makes them suitable for substantial noninfringing use is frivolous. It is the ability of VTRs to make recordings that is at issue in this case. (Videodisc players, which lack a record capability but can play prerecorded discs, are readily available at a considerably lower cost than VTRs.) The fact that the recorder comes in the same box with the playback capacity does not make the recorder suitable for noninfringing use.

[48] "Copyright protection subsists" in any work that is "fixed in any tangible means of expression . . . from which it can be perceived . . ., either directly or with the aid of a machine or device." 17 U.S.C. § 102.

For example, a recorded performance of a Shakespeare play is a copyrighted audiovisual work. Virtually the only broadcast works that are not copyrighted are audiovisual works that, because of age or prior divestitive publication, are themselves in the public domain; government audiovisual works ineligible for copyright; and live programs that are not recorded simultaneously with their transmission and hence are never "fixed". It should be noted that even public domain materials often are accompanied by copyrighted commentary, music or graphics.

[49] It is irrelevant that owners of unregistered works cannot bring infringement actions. 17 U.S.C. § 411. So long as the works remain fixed, they are copyrighted, and their unauthorized reproduction is infringement. 17 U.S.C. § 501.

[50] *See* Pet. Br. 7. Such groups generally own only an uncopyrightable component of the copyrighted audiovisual work. For ex-

of their works—that they do not object to home recording of audiovisual works that incorporate their materials. Petitioners' own evidence establishes that over 80 percent of the programs copied by Betamax owners are entertainment programs, commercially produced motion pictures and television series, whose copying has not been authorized by anyone, and that recording of religious, educational and sports programming collectively accounts for less than 9 percent of home taping activity.[51]

Even if the VTR were capable of substantial noninfringing use, that fact would not absolve petitioners of liability. As the Court has recognized, the question whether a defendant who sells an article that is used for infringing purposes is liable for contributory infringement depends on whether he sold it with the intent and purpose that it would be so used.[52] The necessary intent and purpose obviously are present when the article has

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ample, a football league—if it owns anything—owns only the game itself (which is not a copyrightable work of authorship), not the music, graphics, and commentary or the audiovisual work in which the game coverage is embodied. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 52, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5665; 1 M. Nimmer, *Nimmer on Copyright* § 2.18[H][3] at 2-212 (1982).

[51] Crossley Surveys, Inc., *A Survey of Betamax Owners*, R. 2353, DX OT, Table 20. According to the Crossley survey, religious programs account for less than 0.05 percent of the programs taped by Betamax owners. The comparable figure for educational programs is 1.6 percent. And even home taping of sports programs represents only 7.3 percent of Betamax recording.

[52] *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912), *overruled on other grounds, Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917). *Cf. Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 102 S. Ct. 2182, 2188 (1982) ("if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit.").

no noninfringing use.[53] But the Court has held that, even where there are noninfringing uses, a purpose and intent to facilitate infringing activity "may be inferred when [the article's] most conspicuous use is one which will cooperate in an infringement [and] sale to such user is invoked by advertisement." *Henry v. A.B. Dick Co.*, 224 U.S. at 48-49, *citing Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911).

The *Kalem Co.* decision (on which petitioners also rely, Pet. Br. 42) illustrates this point nicely. In that case, the defendant had reproduced a motion picture dramatizing plaintiff's copyrighted book and sold it for exhibition at various theatres. The Court assumed for purposes of its decision that the film as such did not infringe the copyright in the book since its individual frames did not constitute an infringing dramatization unless exhibited in sequence. *Id.* at 62. The Court also accepted the defendant's argument that it had not exhibited the film but had merely sold it to jobbers. *Id.* Nevertheless, the Court rejected the defendant's staple-item-of-commerce defense and held it liable as a contributory infringer because

> "The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made. If the defendant did not contribute to the infringement it is impossible to do so except by taking part in the final act."

Id. at 62-63.

The present case deals with a machine whose most conspicuous use—the use that is "intended, expected, encour-

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[53] *Id. Cf.* 35 U.S.C. § 271(c) (1976): "Whoever sells a component of a patented machine . . . knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

aged, and the source of the product's consumer appeal," [54]—is the unauthorized reproduction of copyrighted materials. Petitioners designed and engineered the VTR specifically to carry out off-the-air taping operations. They included features, such as the capability to make unattended recordings, that are uniquely suited to that purpose. They advertised, promoted and demonstrated its use as a means of reproducing copyrighted programs and motion pictures. Under these circumstances, it is of no consequence that the VTR may be capable of certain lawful uses, for petitioners plainly expected and intended it to be used for infringement.[55]

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[54] *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d at 975.

[55] It is irrelevant that petitioners could not have known with certainty prior to the decision in this case that unauthorized home taping is infringement. The requirement that a contributory infringer have prior knowledge not only of the infringing activity but of its legal status derives from specific language in the patent statute and has no application here. *See Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488 (1964). A contributory infringer of copyright need only have actual or constructive knowledge of the infringing activities. 3 M. Nimmer, *Nimmer on Copyright* § 12.04[A] at 12-34 (1982). *Cf. Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 404 (S.D.N.Y. 1966) (defendants who had been hired to advertise pirated records could be held liable for contributory infringement if the unusually low price for the records should have served as notice of their infringing nature).

CONCLUSION

For the foregoing reasons, CBS respectfully requests the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

LLOYD N. CUTLER
JOEL ROSENBLOOM
LOUIS R. COHEN *
DUANE D. MORSE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Amicus Curiae CBS Inc.

Of Counsel:
GEORGE VRADENBURG III
HARRY R. OLSSON, JR.
CBS Inc.
51 West 52 Street
New York, New York 10019

October 27, 1982

* Counsel of Record

Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SONY CORPORATION OF AMERICA, et al.,

Petitioners,

—v.—

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE COMMITTEE ON COPYRIGHT AND LITERARY PROPERTY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *AMICUS CURIAE*

MICHAEL S. OBERMAN
(*Counsel of Record*)
LAWRENCE S. ROBBINS
KRAMER, LEVIN, NESSEN, KAMIN & SOLL
919 Third Avenue
New York, New York 10022
(212) 688-1100
Attorneys for the Committee on
Copyright and Literary Property
of the Association of the Bar
of the City of New York, *Amicus Curiae*

Of Counsel:

DAVID H. MARKS
CHARLES H. REACH
LORD, DAY & LORD
25 Broadway
New York, New York 10004
(212) 344-8480

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IN THE

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SONY CORPORATION OF AMERICA, et al.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF FOR THE COMMITTEE ON COPYRIGHT AND LITERARY PROPERTY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *AMICUS CURIAE*

This brief is submitted on behalf of the Committee on Copyright and Literary Property of the Association of the Bar of the City of New York, as *amicus curiae*, pursuant to the written consent of all parties on file with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Committee on Copyright and Literary Property (the "Committee") of the Association of the Bar of the City of New York (the "Association") monitors and reports on the development of copyright law, to educate Association members and to

contribute to this development. While, in their individual practices, Committee members represent clients with specific economic interests and must advocate positions to advance these interests, sitting as a Committee the members attempt to analyze issues of copyright law objectively and to reach conclusions based upon this analysis, rather than upon a prejudged outcome.

This case presents a face-off between traditional property rights and new technology. By using a video cassette recorder ("VCR"), individuals can reproduce easily and at modest expense a motion picture or television program transmitted into the individual's home on VHF, UHF or cable, thereby obtaining possession of a copy of a copyrighted work without the consent of—and without payment to—the copyright proprietor. Because of this technology and its increasing use, this Court's review will have implications beyond the interests of the two producers and one manufacturer who are parties to the case. Within the entertainment and electronics industries, competing economic interests are at stake. Those who derive income from the sale of VCRs or tapes urge the Court to find no copyright infringement in off-the-air reproduction. Those who produce motion pictures or television programs and who see videotaping as a threat to the value of their productions urge the Court to find that off-the-air copying is an infringement.

The Committee, which will not be directly affected by the Court's decision, files this brief because the implications of the case go beyond home video recording. New technology—in the form of computers and photocopiers designed for both office and home—now affords, or will soon afford, individuals the ability to replicate easily a host of copyrighted works. If the Court reaches the issue of infringement[1] and if it holds that

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1 At this juncture, there is no individual user of a VCR among the parties; the defendants who petitioned the Court include a manufacturer and distributor of VCRs, various retail stores and an advertising agency. Unless the Court affirms the court of appeals' finding that these defendants are liable for contributory infringement, the issues of infringement and remedy need not be resolved.

home video recording is not an infringement, the most basic right of a copyright proprietor—control over reproduction of his work—will be greatly diminished, both in the face of new technology and through more traditional infringements, as well. While recognizing the difficult economic and social issues inherent in this case, the Committee respectfully urges this Court to preserve the protections afforded copyright proprietors under the Copyright Revision Act of 1976, 17 U.S.C. §§ 101-810 ("1976 Act" or "Act"), by refusing to create a new and open-ended authorization of verbatim copying of copyrighted works.

Ultimately, the Committee believes, Congress should resolve the range of economic interests as well as policy issues presented by home recording; the opportunities of new technology and the incentives for creativity inherent in copyright protection must be reconciled. The Committee has endorsed the approach of proposed legislation which would exempt noncommercial home recording for personal use from copyright liability while providing a reasonable compulsory license to compensate producers. Amendment No. 1333 to S. 1758, 97th Cong., 1st Sess. (1981), 128 Cong. Rec. S1675 (March 4, 1982) (introduced by Sen. Mathias). Such an approach would achieve a fair balance between the producers of programming and the manufacturers of tapes and recorders, resolving, at least in this instance, the tension between new technology and copyright protection.[2]

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2 Because the Committee's prime concern in filing the brief is that a ruling in favor of petitioners could seriously erode the protections provided by the 1976 Act, we limit our analysis to the question of infringement arising under the 1976 Act only. We do not discuss the contributory infringement issue, which has less pervasive implications for copyright protection and which, in any event, turns on differing views of the evidence before the trial court. Nor do we address below the remedy issue, which neither of the lower courts has, as yet, determined.

We also note that this brief is filed only on behalf of the Committee. The Association's Committee on Communications Law has taken the position (by a vote of 12-6, with the chair dissenting and 10 members

SUMMARY OF ARGUMENT

Off-the-air recording of a copyrighted program without authorization of the copyright proprietor constitutes an act of infringement, which is neither permitted by statutory exemption nor justified by the defense of fair use or First Amendment principles.

The 1976 Act and accompanying reports are rich in detail. Congress attempted not only to set forth the general principles of copyright law but also to anticipate and address a myriad of specific situations. Despite the care and compromises that are apparent in the statute, there is no reference to, much less an exemption for, home video recording. Petitioners ask the Court to engage in legislative legerdemain, to find that Congress slipped an implied exemption into law without attracting the attention of the long list of lobbyists who participated in the revision process. This analysis does not rest on sound legislative construction. As this Court has held, Congress, not the Court, creates exemptions in a statutory structure.

Nor is home video recording permitted under the defense of fair use. That defense serves a limited purpose: it provides a safety valve to assure that the copyright statute advances, rather than retards, the Constitutional purpose of "promot[ing] the Progress of Science and useful Arts." An author is generally given exclusive control over his work, as an incentive to induce creation. Where, however, a second author needs to make limited use of a copyrighted work in order to contribute to "the Progress of Science and useful Arts" and a strict enforcement of the copyright monopoly would preclude his contribution, the law might allow a narrow "fair use"

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not voting) that "it is not a violation of the United States copyright laws to utilize Betamax or similar home recording technology to copy copyrighted material in the home for use in the home." For the reasons set forth in this brief, the Committee on Copyright and Literary Property has reached a different conclusion.

defense. An off-the-air copy of an entire copyrighted work made for the sole purpose of a viewer's convenience does not constitute fair use. To find otherwise would be to gut the protections of the 1976 Act.

So, too, would a holding that a First Amendment "right of access" to entertainment programming overrides the property right conferred by the Copyright Clause of the Constitution and by the 1976 Act. This argument advanced by petitioners and certain *amici* cannot be reconciled with recent decisions of this Court and of the courts of appeals. If adopted, an unfettered right of access would authorize individuals to take another's property without paying—be it a newspaper, a VCR or a copyrighted program—in order to augment their sources of news or entertainment. Free speech does not mean free property; a copyright owner may justly expect compensation for use of his work, and the First Amendment is not violated.

ARGUMENT

OFF-THE-AIR VIDEO RECORDING OF AN ENTIRE COPYRIGHTED WORK INFRINGES THE COPYRIGHT PROPRIETOR'S EXCLUSIVE RIGHT TO CONTROL REPRODUCTION OF THE WORK.

A. The 1976 Act expressly grants to the copyright proprietor exclusive control over reproduction of his work.

Reproduction of a copyrighted work, without authorization from the copyright proprietor, constitutes an act of infringement under the 1976 Act. Such infringement gives rise to liability, unless the reproduction is exempt under one of the Act's narrowly defined exemptions or fits within the limited fair use defense. This is the starting premise. *See generally* 2 M. Nimmer, *Nimmer on Copyright* ("M. Nimmer") § 8.01[A] (1982 ed.).

Section 106 of the 1976 Act provides:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords.

The legislative reports accompanying the 1976 Act make clear that reproduction of the "whole" or "substantial part" of a copyrighted work constitutes an infringement:

> *Reproduction.*—Read together with the relevant definitions in section 101, the right "to reproduce the copy righted work in copies or phonorecords" means the right to produce a material object in which the work is duplicated, transcribed, imitiated [sic], or simulated in a fixed form from which it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *As under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation.*

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5675 ("House Report") (emphasis added).

The right conferred by section 106(1) is broad. Reproduction, even if for private use and even if only a single copy, is an infringement. House Report at 61; 2 M. Nimmer, *supra*, § 8.02[C], at 8-26, § 8.02[D], at 8-26.1. The breadth of this right is designed to ensure that a copyright proprietor will be compensated for his work. In some respects, control over reproduction is the most critical right of the copyright; revenue for many types of copyrighted works—including books, lithographs, and prerecorded video cassette tapes—is derived through the sale of copies. If unauthorized copies of a work can be made without liability, the copyright proprietor will lose the source of his income and—under the Constitutional scheme—the incentive for his creativity. *See Mazer v. Stein*, 347 U.S. 201, 219 (1954).

Several *amici* argue that video recording of a copyrighted program or motion picture is no different from renting a book, lending it to a friend, or reading it at the purchaser's convenience. *See, e.g.*, Brief of *Amicus Curiae* Pfizer Inc. at 11-12. This comparison of a book and a home video recording —while drawn to a wrong conclusion—helps frame the issue before the Court.

Copies of books are sold; the author derives income from these sales. The 1976 Act expressly provides that the purchaser of a book, or other copyrighted work—having paid for a copy—has control over that particular copy (but not the underlying work). 17 U.S.C. § 109(a). But a copy of a copyrighted work derived from off-the-air recording has been appropriated, not purchased; the copyright proprietor, in this instance, has not been compensated for the copy. And, the statute gives the infringer no rights in the misappropriated copy. *See* 17 U.S.C. § 109(c) (privileges of control over copy do not arise when ownership of it is not purchased). The correct analogy is not ownership of a book and off-the-air recording, but rather ownership of a book and ownership of an authorized and *purchased* prerecorded video cassette.[3]

Thus, off-the-air recording infringes the right of reproduction afforded by § 106(1). Three arguments have been advanced to excuse this infringement: that Congress implicitly created an exemption for home video recording; that home

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3 That copyright proprietors should obtain income from reproductions of their motion pictures or television programs creates no fundamental inequity. On the contrary, petitioners and most of the *amici* supporting them seek, indirectly, to derive income from such copyrighted works. Manufacturers and retailers of video cassette recorders or tapes have, as their main selling point, the ability of the recorder and tape to capture off-the-air a copyrighted work; the revenues are tied directly to unauthorized reproductions of copyrighted works. It must also be observed that petitioner Sony is deriving income by exploiting its patent rights related to the Betamax, licensing companies to sell the recorder under their own brand names. *See A $1300 Christmas Toy made in Japan*, FORTUNE, Sept. 1977, at 179.

recording falls within the defense of fair use; and that the First Amendment provides a right to record programs at home. We now turn to these arguments and show that each, in turn, is without merit.

B. Congress has not exempted off-the-air home video recording from copyright liability.

The district court held, and petitioners urge here, that Congress has already—albeit implicitly—determined this dispute, by exempting home video recording from copyright liability if it is done for private non-commercial purposes. While this argument reflects creative lawyering, it does not—as the court of appeals properly concluded—rest on sound statutory construction. Congress may, of course, ultimately speak to the subject, as the Committee believes it should; but it is equally clear that, to date, Congress has not done so.

If the Court were to find a statutory exemption for home video recording already in place, it would expose one of the greatest lobbying coups of recent years. For more than twenty years, Congress considered a wholesale revision of the copyright law. *See generally* House Report at 47-50. During that time, multitudinous interest groups presented their views. *See* National Commission on New Technological Uses of Copyrighted Works, Final Report App. A (July 31, 1978). As changes in technology emerged, additional issues arose, were debated and were resolved—if only by deferring them. Ringer, *The Unfinished Business of Copyright Revision,* 24 U.C.L.A. L. Rev. 951, 952 n.2, 955 (1977). Even with this exhaustive review and revision of the law, there is no indication that Congress focused its attention at all on the issue of home video recording; certainly, Congress did not devote the attention which resolution of the issue will ultimately demand.

In sharp contrast to this absence of Congressional consideration of home video recording prior to adoption of the 1976 Act, there have been a plethora of proposals and a parade of witnesses before the Congress since the Ninth Circuit's opinion

in this case forced the dispute to center stage. *See* Lardner, *Video Wars*, Washington Post, May 2, 1982, at F1. Many views have been heard; many conflicts must still be reconciled. It would be extraordinary if Congress—despite these many views and conflicts—had definitively resolved the issue by implication, slipping an exemption into law without full hearing or debate and without express statutory language.

The language of the 1976 Act—especially its layers of detail, qualifications and exceptions—precludes the conclusion petitioners urge. When Congress intended an exemption to the broad, basic rights conferred by § 106, it said so clearly; it did not leave the most critical issues to implication.

For example, subsection 118(d)(3), one of two exemptions which expressly relate in any manner to off-the-air reproduction, permits governmental bodies or non-profit institutions to make off-the-air reproductions of published nondramatic musical works and published pictorial, graphic and sculptural works as may be contained in public broadcasting programs.[4] However, the statute specifically requires that the reproduction be destroyed at the end of seven days from the transmission; it also states that no person supplying a reproduction to a government body or non-profit institution shall have liability if the recipient fails to destroy the copy, provided that such person gave notice of the requirement of destroying the copy (but the recipient itself shall be deemed to have infringed). The words of the statute, as can be seen, elaborately define the limits of the exemption and resolve problems of application. The legislative reports take this statutory detailing to an even greater refinement. *See, e.g.*, House Report at 120 (confirming that the provisions of § 118(d)(3) are applicable to schools).

Despite the care—and, yes, the compromises—that are apparent throughout the 1976 Act and accompanying reports,

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4 Apart from § 118, § 108(f)(3) provides a limited exemption for videotaping by libraries and archives, to permit them to reproduce newscasts for use in research. *See* House Report at 76-77.

there is no express mention of home video recording.[5] In view of the details Congress provided for the exemptions it intended to create in a precise regulatory scheme involving a delicate balance of competing interests, a court should not attempt to construct additional, unlimited exemptions. This Court has reiterated this rule. *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978).

Petitioners would have the Court ignore this rule and, instead, engage in a "cut-and-paste" approach to legislative history, drawing together isolated sections from statements made at different times by different people in different contexts. They argue that the legislative history of the 1976 Act is composed of 20 years of collected materials; that, in the course of enacting the Sound Recording Act of 1971, P.L. 92-140, 85 Stat. 391 (the "1971 Act"), Congress expressed an intention to exempt home recording of *audio* tapes; and that this supposed exemption was carried over into the 1976 Act, and applied, *sub silentio*, to *video* recording. Petitioners' Brief at 32-39.

The court of appeals properly rejected this contention, accepting—as we do—Professor Nimmer's analysis. *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963, 967

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5 The closest reference, appearing in the Senate Report, suggests that no exemption was intended. In addressing off-the-air reproduction by schools located in a remote geographical area, the Senate Report specifically states that off-the-air copying by such schools solely for purposes of "convenience" would not "under any circumstances" be considered fair use. The report reads as follows:

> The committee's attention has been directed to the special problems involved in the reception of instructional television programs in remote areas of the country. . . . The committee believes that the making by a school located in such a remote area of an off-the-air recording of an instructional television transmission for the purpose of a delayed viewing of the program by students for the same school constitutes a "fair use." *The committee does not intend to suggest however, that off-the-air recording for convenience would under any circumstances, be considered "fair use."* S. Rep. No. 473, 94th Cong., 1st Sess. 65-66 (1975) (emphasis added).

n.5 (9th Cir. 1981) (quoting 3 M. Nimmer, § 13.05[F][5], at 13-96 n.159); *see also* Note, *Universal City Studios, Inc. v. Sony Corp.: "Fair Use" Looks Different on Videotape*, 66 Va. L. Rev. 1005, 1011-12 (1980). The legislative fabric of the 1976 Act is not to be rewoven with loose threads of testimony from the 1971 Act. *Cf. Securities & Exchange Commission v. Sloan*, 436 U.S. 103, 121 (1978) (plain meaning of statute prevails over isolated statement in legislative report, which might not reflect full awareness of Congress). Significantly, petitioners place great weight on extemporaneous comments made by the then-Assistant Register of Copyright in 1971 (Petitioners' Brief at 35); however, when the Copyright Office formally addressed the issue of home video recording this year, it opposed any exemption unless compensation is assured for copyright proprietors and rejected petitioners' conclusion that an exemption had already been established. Statement of David Ladd before the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess., April 21, 1982 at 6, 25 ("Ladd Statement").

In short, Congress has created a broad right to control reproduction, subject to limited, narrowly defined exemptions. The words of Congress are controlling; snippets lifted from a record of twenty years of legislative review cannot prevail over the words ultimately enacted into law. Congress has not exempted home video recording from liability.[6]

C. Off-the-air home video recording of an entire copyrighted work does not constitute fair use.

Unless the defense of fair use is expanded well beyond its present limits and its basic purpose fundamentally altered, it cannot justify the home video recording of an entire copy-

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6 Nor has Congress created any general exemption for otherwise infringing reproductions if made at home; the locus of the act does not alter its character. For example, an individual can, with two VCRs in his home, duplicate a tape. It would be a clear infringement for that individual to rent a copyrighted prerecorded cassette and then to make a duplicate copy for his later use or for swapping with a friend.

righted work—even if made solely for the user's personal convenience. The Committee respectfully urges the Court to preserve the limited nature—and reach—of the fair use doctrine by affirming the court of appeals' determination of the infringement issue.

This case involves, at a minimum, off-the-air recording of entire copyrighted programs, without either authorization from or compensation to the copyright proprietors, for the sole purpose of permitting users to watch these programs at their own convenience and—where prerecorded cassette versions of the programs are for sale or rent—to avoid paying for authorized copies of them. At least two elements in this fact pattern preclude the application of fair use, as traditionally framed. First, no case has held that unlimited and unsupervised reproduction of entire copyrighted works, without authorization, constitutes fair use. *See* note 9, *infra*. Second, no case has held as "fair" a use which in no way contributes to the "Progress of Science and useful Arts," *U.S. Const.* art. I, § 8, cl. 8, but rather merely facilitates the convenience of the user or permits him to avoid paying the copyright proprietor. To hold, as petitioners urge, that home video recording of televised programs or motion pictures is fair use would invite unauthorized copying of these and other types of copyrighted works whenever new technology provides a feasible and inexpensive means of reproduction. Moreover, such a broad defense—tied to no quantitative limit on the amount copied and advancing no purpose inherent in copyright law—would soon undermine the protections conferred by Congress on all copyright proprietors. *See* 3 M. Nimmer, *supra*, § 13.05[E], at 13-81.

1. *The limited purpose of the defense: to facilitate, not impede, creative contributions.*

The question of fair use has typically been described by the lower courts as "the most troublesome in the whole law of copyright." *See, e.g., Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980)

(quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939)). As an equitable defense, it requires the court in each case to isolate and then to balance often numerous competing interests in order to decide ultimately whether an otherwise infringing use should nonetheless be found to be permitted. *See generally* L. Seltzer, *Exemptions and Fair Use in Copyright* 18-48 (1978) ("Seltzer"). No general definition to guide this analysis has emerged either in the long line of cases or in the 1976 Act. Rather, reflecting the presence of competing interests and objectives, a line must be drawn between the infringing and the permitted uses of a work based upon all of the facts at hand. *See Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

This flexible standard enables the doctrine to be invoked for a clear purpose: to ensure the enforcement of the copyright statute, without "stifl[ing] the very creativity which that law is designed to foster." *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980). While historically called the "fair use" doctrine, the concept is more precisely one of "permitted use." Under the Copyright Clause and implementing legislation, an author, as the fundamental precept, is given exclusive control over his work. With this control, the author can derive income by exploiting his work directly or by licensing others to do so. In turn, the opportunity for income provides an incentive for creation. *See Mazer v. Stein*, 347 U.S. at 219.

Where, however, the strict enforcement of a copyright monopoly would unduly interfere with the ability of a *second* author to contribute to the "Progress of Science and useful Arts," the fair use defense provides a safety valve. The second author, in order to complete his contribution, may be permitted to make a "fair use"—a use which advances the Constitutional purpose, which is limited in amount, and which does not potentially harm the original copyright proprietor. *See Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

In effecting this Constitutional purpose, courts are asked in fair use cases to determine what use, if any, of a copyrighted work should be permitted, without authorization of the copyright proprietor and without compensation to him, in order that a second creation be completed. *See Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). The decision in *Meeropol v. Nizer*, 520 F.2d 1061, illustrates the approach to this defense. There, plaintiffs, sons of Julius and Ethel Rosenberg, sued Louis Nizer, who wrote a book on the Rosenberg case, as well as his publishers, alleging that the Nizer book incorporated, without authorization, substantial portions of copyrighted letters written by the Rosenbergs. These excerpts amounted to some 1957 words, less than one percent of the book.

Reversing the district court's entry of summary judgment in favor of defendants, the court of appeals held that this incorporation of the letters could not, as a matter of law, be said to constitute fair use. The court focused principally on the extent of use, in particular the presence of verbatim reproduction. 560 F.2d at 1070. It observed that, even though biographers often quote from earlier works, verbatim portions of 28 letters had been taken. The court also directed the trier of fact to determine what effect defendants' use would have on the potential market for the letters, which had been out of print for 20 years. Setting forth the relevant fair use factors, the court stated:

> The purpose and character of the use of the copyrighted material, the nature of the copyrighted work, and amount and substantiality of the work used, and its effect upon the potential market for the copyrighted material are factors which must be evaluated in concert. . . . If the effect on the market by an infringing work is minimal, for example, far greater use may be privileged than where the market value of the copyrighted material is substantially decreased. Similarly, where use is made of underlying historical facts such use will be entitled to complete

> freedom but *it is otherwise if there is verbatim copying of original, copyrighted material.* "The fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material set down by another cannot satisfy that standard."

560 F.2d at 1069-70 (emphasis supplied; citations omitted).

The fair use defense, as evolved in case law, was codified for the first time in § 107 of the 1976 Act. Congress did not intend to "change, narrow, or enlarge [the doctrine] in any way." House Report at 66. Thus, in applying the statute, the purpose of the fair use defense—revealed in the case law—is to be served.

Each of the four factors contained in § 107 reflects the basic objective of the defense. For example, in examining the purpose and character of the use, a court must consider the contribution to be made by the second author which might be precluded by a strict enforcement of a copyright monopoly. Uses which "promote the Progress of Science and useful Arts" may be encouraged, while a completely commercial exploitation of a work might be barred. *MCA, Inc. v. Wilson*, 677 F.2d 180, 182-83 (2d Cir. 1981); *Rubin v. Boston Magazine Co.*, 645 F.2d 80 (1st Cir. 1981); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d at 1171. The preamble to § 107 recites the most common illustrations of fair use: "criticism, comment, news reporting, teaching . . . scholarship, or research." 17 U.S.C. § 107.[7]

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7 In virtually all instances where the fair use defense has been sustained, the use in question has resulted in a second work of authorship; there has been a contribution to the "Progress of Science and useful Arts." *See generally* 3 M. Nimmer, *supra*, § 13.05. The two exceptions traditionally recognized and specifically mentioned in § 107 are in the areas of education and research; certain uses of works may be made in the context of classroom teaching or by libraries or archives. *See* House Report at 66-72, 74-79. The 1976 Act frames these exceptions in narrow confines. *Id.* There is neither statutory nor case support—especially outside the areas of education and research—for a broad application of the fair use defense where no second work is created and where only the user's convenience is served.

Similarly, under the second factor, a court must view the nature of the copyrighted work and consider whether certain uses would defeat the author's expectations, and deter further creativity. *See* Seltzer, *supra*, at 29-30, 34. Thus, a later researcher or author may draw on historical facts contained in a copyrighted biography for a subsequent book; facts, in themselves, cannot be copyrighted and even a slight use of protectable expression in a later work may be permitted under the fair use defense. *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). However, verbatim replication of a work designed to provide entertainment—the value of which is in its creativity—is generally not permitted. 3 M. Nimmer, *supra*, § 13.05[A], at 13-62.

Having analyzed the proposed use and the nature of the work, the court must evaluate the quantitative and qualitative amount of the taking, to measure whether such use is in fact required to permit the second contribution and whether such use—if too extensive—might discourage creativity. *Meeropol v. Nizer*, 560 F.2d at 1070 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 347 (C.C.D. Mass. 1841) (No. 4901)). Finally, the court must analyze the effect of the proposed use on the "*potential* market for or value of the copyrighted work." 17 U.S.C. § 107(4) (emphasis supplied). Again, the focus is on whether the Constitutional purpose—the assurance of an economic incentive to create—will be diminished. *MCA, Inc. v. Wilson*, 677 F.2d at 182-83. This factor looks not only to the single instance of infringement before the court, but also requires the court to determine what effect on the copyrighted work would occur if the proposed use could be made by others. 3 M. Nimmer, *supra*, § 13.05[B], at 13-65.

In sum, fair use is a limited doctrine, providing a safety valve when the incentive to create the underlying work—the copyright monopoly—could also prevent a valid contribution by a second author. The line between permissible use and infringement may, at times, be difficult to draw. Nonetheless, this limited defense has, in practice, enabled courts to resolve

competing interests, protecting the rights conferred under the Copyright Clause while enabling later authors to draw, when required, upon what has come before.

2. *The court of appeals properly concluded that home video recording does not fall within the boundaries of fair use.*

The court of appeals properly concluded that the "fair use doctrine does not sanction home videorecording." 659 F.2d at 971. While the court did examine the four factors of § 107, its framing and analysis of a threshold issue—whether invocation of fair use here would advance the Constitutional purpose—was sound. Taking this broader view first, the court recognized that the infringement here does not result in any contribution at all; it is simply an appropriation of an unauthorized copy of a copyrighted work—what the court termed an "intrinsic," rather than "productive," use. *Id.* at 969-72; *see* Seltzer, *supra*, at 24; Note, *supra*, 66 Va. L. Rev. at 1012-14.

A review of each of the four factors of § 107 supports the court's conclusion.[8] The first factor, the character of use, weighs against the defense, because only the convenience of the user is achieved. All that exists after the infringing use is extra copies of copyrighted works; there has been no new creation. A use designed to avoid payment for an authorized copy and which in no direct way relates to the creation of a scholarly or cultural work is an unlikely candidate for fair use protection. *See* 3 M. Nimmer, *supra*, § 13.05[B], at 13-70.

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8 Rather than deal with the purpose and the intended scope of the statutory factors, petitioners have attempted to inject into fair use various factors that are totally irrelevant to that analysis. Thus, they discuss, under the fair use title, the lack of suits by other authors (Petitioners' Brief, at 29) and cases dealing with access to the airwaves (*Id.* at 24-26). Neither set of considerations is germane. The public's "right" to receive a broadcast has nothing to do with fair use. *See* Section D, *infra*. Nor does the fact that certain copyright proprietors have consented to home video recording; a waiver of rights by one author has never been held to extinguish valid copyrights of other authors of similar types of works.

The second factor, the nature of the work, also weighs against application of fair use. With certain works, especially collections of information, the Constitutional purpose of fair use is advanced when the research of the first work facilitates completion of a second work. Fair use is less often applied when creative works are infringed. 3 M. Nimmer, *supra*, § 13.05[A], at 13-62. The 1976 Act, recognizing the risks and expenses required to produce motion pictures, includes special protections for such works. Ladd Statement, *supra*, at 20.

The third factor, amount and substantiality of use, is virtually dispositive here. Concededly, VCR users reproduce verbatim copies of entire copyrighted works. Such use is necessarily an infringement. *See Meeropol v. Nizer*, 560 F.2d at 1070; *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310.

Finally, the fourth factor, the effect on the "potential market or value" of the copyrighted work, also compels a rejection of fair use. The court of appeals properly recognized that the infringing use must be reviewed not as a singular example, but as a type of use which—if made by others—could affect the value of the copyrighted work. 659 F.2d at 973; *see* 3 M. Nimmer, *supra*, § 13.05[B], at 13-65. The court concluded that the cumulative effect of home copying will harm the potential market for the copyrighted works.[9]

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9 Petitioners, as did the district court, place great reliance on *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided Court*, 420 U.S. 376 (1975), which held that photocopying of articles from learned journals by government libraries to permit scientific research constitutes fair use. The Court of Claims' decision has been subject to strong criticism. 3 M. Nimmer, *supra*, § 13.05[E], at 13-83. However, whether or not *Williams & Wilkins* was properly decided, its holding would not support unauthorized reproduction through home video recording. First, the nature of the use and of the works are quite distinct. In *Williams & Wilkins*, scholarly works were being used to promote scientific research; indeed, the very purpose of the authors in allowing publication was to disseminate knowledge and to facilitate further research. Here, entertainment

Home video recording of entire copyrighted works, for the benefit of the user only, does not advance the Constitutional purpose at the core of the fair use defense; it threatens the protection given to copyright proprietors without creating new works. It is not a fair use.

D. The First Amendment does not override the right to control reproduction of a copyrighted work.

Asserting various rights under the First Amendment, petitioners and several *amici* contend that restricting home video recording would be unconstitutional. Simply put, it is contended that freedom of speech entails a correlative right to "hear" or "receive information." *See, e.g.*, Brief of *Amicus Curiae* Virginia Citizens' Consumer Council, Inc., *et al.* In turn, these "rights" are said to entitle consumers to use whatever may be necessary to facilitate their gathering of information—including home video recording.

This resort to the First Amendment is without merit. First and foremost, this Court decisively rejected such contentions in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). Petitioners' thesis would, without any basis, require this Court to overrule that recent decision—and, moreover, to do so where the asserted First Amendment interest is *de minimis*.

In *Zacchini*, petitioner Hugo Zacchini performed a "human cannonball" act for a living. During one performance, a reporter from the Scripps-Howard Broadcasting Company, without permission, videotaped Zacchini's act and later broadcast it on a news program. Zacchini sued for damages, alleging a violation of his state-law "right of publicity." The Ohio

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programming is being copied solely for the viewer's convenience. Second, even though copies of particular articles were made by the government libraries, the reproduction of copyrighted works was not unrestricted. The Court of Claims was careful to note that entire journals were not copied, and reproduction of articles for any one user was monitored and limited. 487 F.2d at 1354-55. Here, the use is unrestricted and unsupervised.

Supreme Court ruled for the broadcasters on First Amendment grounds. This Court reversed.

As the Court observed, the broadcasters had not simply reported facts about Zacchini's performance. 433 U.S. at 569. Rather, they had "broadcast a[n] . . . entire act without [the performer's] consent." *Id.* at 575. Expressly analogizing Zacchini's "right of publicity" to federally created patent and copyright laws, the Court held that the First Amendment did not entitle respondents to "appropriat[e] . . . the very activity by which the entertainer acquired his reputation. . . ." *Id.* at 576. Quoting from *Mazer v. Stein*, 347 U.S. 201 (1954), the Court set forth this rationale for protecting Zacchini's rights, notwithstanding the broadcasters' First Amendment claim:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

433 U.S. at 576 (quoting *Mazer v. Stein*, 347 U.S. at 219).

Like the broadcasts in *Zacchini*, the wholesale copying of creative works through home video recording cannot be defended on First Amendment grounds. A VCR, by design, copies not simply a producer's ideas but also every inch of his product. Indeed, this Court's holding in *Zacchini* applies with even greater force in this case. For we deal here not with a broadcaster who wishes to present a copyrighted performance for newsworthy purposes; on the contrary, home video recording involves nothing more than the private, unauthorized consumption by viewers. Moreover, unlike the "right of publicity" in *Zacchini*, copyrights are constitutionally rooted and are authorized by clear Congressional mandate. The First Amendment defense pressed in *Zacchini* must, *a fortiori*, fall even harder in this case.

Further, the First Amendment claim in this case is, as a practical matter, untenable. Taken to its logical limit, the "rights" urged would not only impair fundamental copyright law; they would substantially undermine basic principles of private property—potentially entitling consumers, as a matter of law, to appropriate whatever may be necessary to secure "access to information." To exercise the "right to hear," after all, the consumer must have a VCR and television in the first place. But the First Amendment surely cannot be construed to give consumers a right to appropriate VCRs and televisions without payment. The "right to hear" simply proves too much.

Significantly, no precedential support for this broad "right to hear" has been cited. Indeed, the courts of appeals that have considered such putative First Amendment claims have uniformly rejected them—in favor of the rights of copyright holders. *See, e.g., Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979); *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91; *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). The First Amendment is satisfied so long as access to ideas is not foreclosed. Since copyright protection extends only to the *expression* of an idea—and not to the idea itself—recognition of a copyright cannot transgress the First Amendment. *See, e.g., Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91. Where, as here, a VCR user copies an entire product—the expression, in addition to the ideas—the First Amendment cannot shield him from copyright liability.[10]

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10 In rejecting the broadcasters' First Amendment defense in *Zacchini*, the Court also relied on *Goldstein v. California*, 412 U.S. 546 (1973), which upheld a California law prohibiting unauthorized duplication of recordings. The Court noted that the *Goldstein* decision had rejected a broad-based constitutional challenge because the law—like the federal copyright laws—placed " '[n]o restraint . . . on the use of an idea or concept.' " 433 U.S. at 577 n.13 (quoting *Goldstein v. California*, 412 U.S. at 571). The Court went on to observe, with apparent approval, that a number of federal courts had "rejected First Amendment

This Court—in addition to the squarely controlling *Zacchini*—has rejected, time and again, the contention that the First Amendment guarantees an unalloyed right to maximum information. *See, e.g., Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (federal policy prohibiting press interviews with prisoners does not abridge any First Amendment right of access to sources of information); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (no First Amendment right to place editorial advertising on the radio); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information"). As Justice Brennan noted in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980):

> While freedom of expression is made inviolate by the First Amendment, and, with only rare and stringent exceptions, may not be suppressed, . . . the First Amendment has not been viewed by the Court in all settings as providing an equally categorical assurance of the correlative freedom of access to information. . . .

448 U.S. at 585 (Brennan, J., concurring).

Finally, petitioners' reliance on a First Amendment right to "hear" ignores the firm—and settled—constitutional rights on *the other* side of the balance. Copyrights are authorized by Article I, § 8, cl. 8, and have been duly implemented by Congress. 17 U.S.C. § 101 *et seq.* Indeed, as one court of appeals has aptly noted in rejecting an infringer's First Amendment defense, "[t]he judgment of the constitution is that free expression is enriched by protecting the creations of authors from exploitation by others. . . ." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d at 1187. By undermining the copyright scheme, petitioners' thesis damages—not furthers—First Amendment values.

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challenges to the federal copyright law on the ground that 'no restraint [has been] placed on the use of an idea or concept.' " 433 U.S. at 577 n.13 (quoting *United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974)).

CONCLUSION

The narrow question before the Court is whether home video recording of entire copyrighted works without authorization from or compensation to the copyright proprietors is an infringing use under the 1976 Act, as presently written. For the reasons stated above, we respectfully urge the Court to hold that home video recording is an infringement, for which there is neither an existing exemption nor defense. But even more, we respectfully urge the Court to preserve the rights specifically conferred on copyright proprietors in § 106 of the 1976 Act. To hold that additional exemptions can arise by implication from isolated passages in a 20-year legislative record, that unauthorized reproduction of entire works for the sole purpose of a user's convenience can be fair use, or that a First Amendment right of access can override a proprietor's control over reproduction of his work would result in a serious erosion of copyright protection. Congress can—and, we believe, should—address the competing economic and social interests presented by the advent of VCRs and determine whether an amendment to the 1976 Act is warranted. But unless and until Congress acts, the law exists in its present form—with no express or implied exemption for home video recording.

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October 22, 1982

Respectfully submitted,

MICHAEL S. OBERMAN
(*Counsel of Record*)
LAWRENCE S. ROBBINS
KRAMER, LEVIN, NESSEN, KAMIN & SOLL
919 Third Avenue
New York, New York 10022
(212) 688-1100
Attorneys for the Committee on
Copyright and Literary Property
of the Association of the Bar
of the City of New York, *Amicus Curiae*

Of Counsel:

DAVID H. MARKS
CHARLES H. REACH
LORD, DAY & LORD
25 Broadway
New York, New York 10004
(212) 344-8480

Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SONY CORPORATION OF AMERICA, *et al.*,
Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE CONSUMER ELECTRONICS GROUP IN SUPPORT OF PETITIONERS

J. EDWARD DAY
(Counsel of Record)
WILLIAM K. BLACK
GARY J. SHAPIRO
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-6600
Attorneys for Amicus Curiae
Consumer Electronics Group of the Electronic Industries Association

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE CONSUMER ELECTRONICS GROUP IN SUPPORT OF PETITIONERS

I. THE CONSUMER ELECTRONICS GROUP REPRESENTS SUBSTANTIALLY ALL OF THE COMPANIES OFFERING VIDEO TAPE RECORDERS FOR SALE IN THE UNITED STATES

This brief is submitted by the Consumer Electronics Group of the Electronic Industries Association ("EIA/CEG") with the written consent of all parties on file with the Clerk of this Court. EIA/CEG is a 56-year-old trade association with headquarters in Washington, D.C.

The vital interests of the television receiver and video tape recorder ("VTR") industry are at stake in these proceedings, and as a representative of nearly all television and VTR manufacturers and sellers of the product at the manufacturer's level in this country, EIA/CEG has a crucial interest in supporting the Brief on the merits filed by Petitioner Sony Corporation of America.

II. SUMMARY OF ARGUMENT

The VTR is the result of dramatic technical advances. It is capable of performing many functions. It can record broadcast television when the consumer is unable to watch a program, and then replay it at a later time when the viewer is able to watch the program. The typical VTR viewer then erases the recorded program by recording a new program for later viewing. This use, the primary use of present VTRs,[1] is called "time shifting". By unshackling users from the vagaries of television scheduling, the VTR permits job, family and recreation to take precedence over television. Other uses for VTRs are developing continually.[2]

The Court of Appeals has ruled that time shifting constitutes copyright infringement, and that manufacturers and sellers are guilty of contributory infringement because VTRs are not capable of substantial non-infringing uses. This brief addresses the first of those issues. Time shifting is a "fair use" and not an unlawful infringement of copyright.

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[1] The trial court found that time shifting was the primary use. Petitioners Appendix ("Pet. App.") at 47-48.

[2] Other uses include playing tapes of movies that the viewer rents or buys, making home movies with the aid of video cameras, displaying movies that the American Broadcasting Company will soon broadcast during the early morning hours when television broadcasters normally do not transmit signals—special VTRs will record these signals and replay them when the owner chooses, and storing and displaying teletext, videotext and home computer graphics and electronic photography.

size, VTRs can increase the economic rewards to copyright holders.

Thus, both primary uses of VTRs facilitate the dual goals of the copyright laws. First, they increase the dissemination of news, artistic entertainment and educational programming to the public. Second, they provide increased economic rewards to copyright holders and add to the incentives for authors to produce further works.

The trial court found that VTRs did not cause any injury to copyright holders and explained that time shifting could increase the audience and economic rewards for copyrighted works. The Court of Appeals, without finding any of these factual findings to be erroneous, decided that use of VTRs could not be a fair use because it involved a so-called "intrinsic" use. An intrinsic use is the making of a copy that serves the same function as the original. This mechanistic rule is contrary to the balancing test underlying the copyright clause, case law, and the express will of Congress.

The Court of Appeals also declared that VTRs must injure copyright holders. Whether the Court of Appeals was announcing a new irrebutable presumption of injury or attempting to take judicial notice of this "fact" is unclear. It is indisputable, however, that after an extensive trial the district court reached an opposite factual conclusion. Moreover, if the Court of Appeals meant to go beyond the record and take judicial notice of injury it also erred. The respondents' receipt of hundreds of millions of dollars annually from sales of pre-recorded video tape and the current practices of the commercial television rating services which measure VTR audience size support precisely the opposite conclusion. In sum, the advent of the VTR is the best thing ever to happen to respondents.

The fair use doctrine is an exception to copyright infringement liability. The doctrine arose from equitable considerations and reflects the balancing test underlying the copyright clause to the Constitution. That is, copyright law creates a limited grant of monopoly to the author for the purpose of providing a material incentive to create works that will benefit the public. It is the public interest that controls, the limited grant of copyright monopoly is simply a device used indirectly to aid the public.

Fair use inquiries generally require a delicate balancing procedure weighing the loss to the author from the infringement against the benefit to the public of the infringing use of the author's work. Use of VTR's, however, does not require such precision balancing of competing concerns.

The concern of copyright holders is to maximize their revenues from the sale of their rights. Copyright holders are involved with VTRs in two markets. First, they sell movies recorded on videotape to VTR owners. Both respondents are active in this market. The more VTR owners, the bigger their pre-recorded videotape market. This market would not exist if the members of EIA/CEG had not created and marketed VTRs.

Copyright holders are also involved with VTRs because they license television broadcasters tc carry their programs. The economics of commercial "free" television are based upon advertising fees. These fees, in turn, are dependent upon how many viewers a particular program attracts. The advertising client, broadcaster and copyright holder all want the same thing—the biggest audience possible. By definition, time shifting increases the audience for the "infringed" program. A potential viewer that could not otherwise watch the "infringed" program becomes an actual viewer because the VTR allows viewing at a later time. By expanding audience

III. NON-COMMERCIAL USE OF VTRs TO RECORD "FREE" BROADCAST TELEVISION PROGRAMS IS A FAIR USE

A. The Traditional Fair Use Doctrine

The fair use doctrine holds that certain uses of copyrighted materials that would otherwise constitute unlawful infringement are permitted.[3] The fair use doctrine is entirely equitable. *Iowa State University Research Foundation, Inc. v. American Broadcasting Co.*, 621 F.2d 57, 62 (2d Cir. 1980). As this Court has explained, the copyright laws reflect a "balance of competing claims upon the public interest: Creative work is to be . . . rewarded, but . . . must ultimately serve the cause of promoting broad public availability. . . ." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). The issue of fair use is one of fact and thus a reviewing court should use the "clearly erroneous" standard of review. *MCA, Inc. v. Earl Wilson*, 1981 COPYRIGHT LAW DECISIONS ¶ 25,287 at 16,582 (2d Cir. 1981); *Eisenschmil v. Fawcett Publications, Inc.*, 246 F.2d 598, 603-04 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957). The Court of Appeals did not declare any of the trial court's findings to be clearly erroneous. Yet it reversed the trial court's ruling and declared that VTR usage could not be a fair use.

B. The Court Of Appeals Intrinsic Use Rule

The Court of Appeals, however, in a major departure from existing law, declared that no balancing test should be employed with regard to VTRs. It ruled that a so-called "intrinsic use", *i.e.*, a use in which the copy serves the same function as the original, cannot be a fair use regardless of the balance of the equities (Pet. App. at 18). In reaching this ruling, the Court of Appeals acted

[3] The fair use doctrine was expressly placed in the Copyright Revision Act of 1976. See 17 U.S.C. § 107.

in express conflict with the *Williams and Wilkins*[4] decision and the factual findings of the district court, and in derogation of the principles underlying the fair use doctrine enunciated by Congress and the Judiciary.

While apparently recognizing that the fair use doctrine requires "balancing the equities" the Court of Appeals refused to employ the normal balancing test because it felt that such balancing was "hostile . . . to the rights of copyright holders" (Pet. App. at 18). The Court of Appeals felt that '[n]ew technology . . . places a strain upon the fair use doctrine" and implied (with apparent disfavor) that new technology would generally be classified as a fair use if the balancing test were used. *Id.*

The fear that the copyright holder will "lose" is not a principled reason for not employing the balancing test that has always been the heart of the fair use doctrine. Moreover, substituting a mechanistic rule that an intrinsic use "precludes" a finding of fair use with regard to new technology (Pet. App. at 18) is contrary to the express will of Congress. As the House Report accompanying the 1976 Copyright Act explained:

> General intention behind the provision
>
> The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what

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[4] *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct.Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

> fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 66, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 5680.

Congress did not share the Court of Appeals' hostility to new technology. It directed a flexible, case-by-case balancing process such as the trial court employed in finding fair use. Congress deliberately eschewed inflexible rules-of-thumb of the kind relied upon by the Court of Appeals.

Congress intentionally left the fair use definition open ended:

> to accommodate the perpetually unsettled quality associated with the *technological* production and dissemination of ideas, products and artistic creations. The fluidity built into the statutory fair use exception is premised on the flux which is endemic to the *means* of transmission—not the substance transmitted.

Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875, 880 (S.D. Fla. 1978) (emphasis in original), *aff'd on other grounds*, 626 F.2d 1171 (5th Cir. 1980).

The Court of Appeals also failed to explain why an intrinsic use should preclude a fair use. An intrinsic use, in certain circumstances, may yield smaller benefits than other uses, but the normal balancing test would take account of such a reduction in benefits. It cannot be gainsaid that new technologies employing intrinsic uses, *e.g.*, VTRs and photocopiers, are perceived by consumers as being tremendously beneficial. Indeed, it is precisely because the Court of Appeals feared that VTRs would be found so beneficial that it refused to "balance the equities" (Pet. App. at 18).

The Court of Appeals attempted to picture its actions as the product of judicial restraint and deference to Congress, but its actions belie its characterization. The Court of Appeals refused to employ the case-by-case balancing process mandated by Congress with regard to new technology and fair use because the Court of Appeals made a policy judgment that such a process would prove too "hostile" to copyright owners. This is a classic example of a court substituting its policy judgment for that of Congress.

The Court of Appeals acknowledged that its intrinsic use rule was contrary to *Williams and Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975). The Court of Appeals attempted to savage that decision by stating that it "has been appropriately regarded as the 'Dred Scott decision of copyright law'" (Pet. App. at 15, quoting Nichols J. in dissent, 487 F.2d at 1387). This *ad hominen* attack ignores the fact that Congress essentially adopted the *Williams & Wilkins Co.* decision when enacting Section 107 of the Copyright Act of 1976 (the "Act"),[5] 17 U.S.C. § 107 and took the four illustrative fair use factors listed in section 107 of the Act from that decision.

C. Home Videotaping Is Fair Use Under The Four Criteria Listed In Section 107 Of The Copyright Act

Section 107 of the Copyright Act lists four criteria for courts to consider in determining whether the use of a work is fair and thus non-infringing. Analysis of these factors, separately and together, compels the conclusion that home videotaping of broadcast works is not a copyright infringement.

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[5] As one court has recognized, "[t]he court's analysis in *Williams & Wilkins* . . . remains valid today as to questions left open by the New Act." *Encyclopedia Britannia Educational Corp. v. Crooks*, 447 F. Supp. 243, 250-51 n.8 (W.D.N.Y. 1978).

1. *Home Videotaping Is Both Non-commercial In Character And Serves Legitimate Public Purposes*

The first factor listed in Section 107 is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). The district court found that the home video taping is a private, non-commercial use which promotes First Amendment policies. (Pet. App. at 82).[6]

The non-commercial nature of the recording at issue is of *critical* importance in evaluating a fair use defense.[7] Significantly, the purpose behind the copyright clause in the Constitution and the copyright laws generally is to reward copyright owners for commercial uses of their work. Indeed, this Court has emphasized this underlying purpose. In *Goldstein v. California*, 412 U.S. 546 (1973) this Court, in upholding a state copyright statute on sound recordings, declared:

> The (copyright) clause thus describes both the objective which Congress may seek and the means to achieve it . . . . To accomplish its purpose, Congress may grant to authors the *exclusive right to the fruits* of their respective works. An author who pos-

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[6] The Court of Appeals challenges the "non-commercial" characterization of home videotaping as a "bit misleading" because the corporate defendants do not promote videotaping for "strictly altruistic reasons." (Pet. App. at 19 n.9). The fatal error in this view of the commercial nature of fair use is that it is not the recording of the corporate or retail defendants which is at issue; rather it is the recording by the individual defendants who tape for non-commercial purposes in their homes.

[7] *See e.g. Northwestern Bell Telephone Co. v. Bedco of Minnesota, Inc.*, 501 F. Supp. 299, 303 (D.Minn. 1980); *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D.Cal. 1955); *Loew's Inc. v. Columbia Broadcasting System Inc.*, 131 F. Supp. 165 (S.D.Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam*, 356 U.S. 43 (1958).

> sesses an unlimited copyright may preclude others from copying his creation *for commercial purposes* without permission. In other words, to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors *a reward in the form of control over the sale or commercial use* of copies of their works. 412 U.S. at 555 (emphasis supplied).

The three highlighted portions underscore the Court's emphasis on the commercial control over copyrighted works. The non-commercial nature of VTR usage strongly favors a finding of fair use.

Related to the non-commercial purpose is the private nature of the usage by the family within the home. Internal use is more likely to be fair use. *Key Maps, Inc. v. Pruitt*, 470 F.Supp. 33, 38 (S.D.Tex. 1978) (300 copies of map made for firehouse use only held to be fair use.)

2. *The Public Interest Is Served By The Widest Possible Access To Broadcast Television*

The second of the four criteria in § 107 is the nature of the copyrighted work. The Court of Appeals stated that the applicable standard is whether "the additional access 'would serve the public interest in free dissemination of information.'" (Pet. App. at 20) quoting *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) and *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130, 146 (S.D.N.Y. 1968). The Court of Appeals implied that broadcast works, as entertainment, are less amenable to claims of fair use. Pet. App. at 21.

With respect, this reasoning is misplaced. First, it is not clear that broadcast works can so cavalierly be labeled as mere entertainment. Such works include news, investigatory, historical, political, educational and scientific programs. While respondents' particular copy-

righted works may be primarily entertainment, this is no reason to impose copyright liability. The copyright clause empowers Congress to "promote the Progress of Science and the useful Arts . . ." U.S. CONST. art. 1, § 8. The Court of Appeals' derogation of the value of respondents' works suggests that they do not fulfill the purposes that lead Congress to grant copyrights, and that such works are less deserving of copyright protection. Moreover, respondents' works are only a tiny percentage of all broadcast works. The broader dissemination of many of these works is unquestionably in the public interest and would "promote the Progress of Science and the useful Arts . . ."

Thus there are strong public policy and historical reasons for invoking the fair use doctrine and permitting home viewers maximum access to broadcast works.

3. *Use Of An Entire Work Can Be Fair Use*

The two lower courts disagreed as to whether copying of an entire work can be fair use. The district court stated that the third factor, substantiality, is inextricably intertwined with the question of harm (Pet. App. at 82) while the Court of Appeals found that an entire taping can never be a fair use (Pet. App. at 22).

Traditionally, the question of infringement of copyright is not one of quantity but of quality and value.[8] What constitutes a fair use of a copyrighted work has never been determined by quantity alone. *American Institute of Architects v. Fenichel*, 41 F.Supp. 146 (S.D.N.Y. 1941). In fact, copying of an entire copyrighted work, even if not a home use can be a fair use depending on

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[8] *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664, 667 (7th Cir. 1950); *Eisenchiml v. Fawcett Publications, Inc.*, 246 F.2d 598, 603 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957) quoting Ball, *The Law of Copyright and Literary Property*, 357 (1944).

the purpose of the copying, the economic harm, the intent of the copier and the number of copies.[9]

Admittedly, a few decisions have broadly implied that the fair use defense is irrebutably presumed to be unavailable when there is duplication of most or all of a copyrighted work. All of these cases, however, involved copying for commercial purposes. In each case copying was found to harm the market for the copyrighted work.[10]

4. *Home Taping Enhancement Of The Market For Copyrighted Works Favors A Finding Of Fair Use*

The fourth factor in section 107, the "effect of the use upon the potential market for or value of the copyrighted work", has typically been considered the central consideration. *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F.Supp. 741, 747 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980); *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (S.D.N.Y. 1914).[11] But the Court of Appeals fair use analysis perverted the nature and importance of the effect on the market. In doing so it also demonstrated a fundamental lack of understanding of the market impact VTRs have had and are likely to have in the future.

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[9] *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct.Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975); *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33 (S.D.Tex. 1978).

[10] *See e.g., Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (preliminary injunction not issued as biography did not affect market for magazine article); *Quinto v. Legal Times of Washington, Inc.*, 506 F. Supp. 554, 560 (D.D.C. 1981) (copyrighted news story published for commercial purposes held to be infringement as publication eliminated potential market).

[11] Indeed, it appears that the members of the constitutional convention which drafted the copyright clause "had in mind a copyright limited in scope, which would affirm and protect *only* the author's economic right." L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE, 194 (1968).

VTRs are unprecedented. Their primary uses, time shifting and display of prerecorded video tapes, benefit copyright holders.

The goal of a television broadcaster is to induce as many people as possible to watch its programs. Some potential viewers, however, cannot be home or are doing something else when a program they would like to watch is broadcast. By using a VTR to "time shift," which the district court found to be the primary use of VTRs, those potential viewers are able to become actual viewers and the goal of the broadcaster is enhanced by the VTR. The trial court found that VTRs had this potential to benefit copyright holders by expanding viewing of their programs (Pet. App. at 110, 112).

The Court of Appeals did not declare that finding, or the trial court's finding that the plaintiffs below were not injured by VTR usage, to be clearly erroneous. The Court of Appeals, however, concluded on the basis of *a priori* reasoning that there must be injury. Its logic was two-fold. First, the Court of Appeals declared that:

> It is clear that home users assign economic value to their ability to have control over access to copyrighted works. The copyright laws would seem to require that the copyright owner be given the opportunity to exploit this market (Pet. App. at 24).

With respect, this is a *non sequitur*. The copyright holder does not control access to televised programming in the sense envisioned by this quotation. Once broadcast, anyone can view a normal television signal—no license or fee is required, only a television receiver. The commercial networks spend millions of dollars trying to maximize viewership. Viewers "assign economic value" to a television receiver because it gives them "access to copyrighted works," but they pay no fee to copyright holders when they purchase the receiver. As noted above, copyright holders "exploit this market" through payments they receive based on projected viewers of their

program and the resultant advertising rates. Thus, copyright holders already "exploit" the VTR market and they do so in the identical manner in which they exploit the general television market.[12]

The Court of Appeals' second resort to *a priori* reasoning was the following:

> The [trial] court, in analyzing the fourth fair use factor, did not pay sufficient attention to the *cumulative* effect of mass reproduction of copyrighted works made possible by videorecorders. It seems clear that absent an inquiry which takes into consideration the full scope of the "infringing" practice, copyright plaintiffs, in cases of this sort, would face insuperable obstacles to the protection of their rights. And, where one looks at the full scope of the activity in question, it seems clear that it tends to diminish the *potential* market for appellants' work (Pet. App. at 24-25) (emphasis in original).

Again, things were "clear" [13] to the Court of Appeals without any citation to the trial record, indeed, directly contrary to the trial court's findings of no injury and potential financial benefit from VTR usage.

Even a brief examination reveals that there is no *a priori* means of finding that the cumulative effect must tend to diminish the copyright holder's *potential* market. The alleged infringement in time shifting is recording a program, that the viewer ordinarily would have missed, for viewing at a later time. *A priori* reasoning suggests that this "infringement" increases viewership of the "in-

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[12] Note that in both cases there is no control over whether the viewers will actually watch the advertising that is the economic base for free commercial broadcasting.

[13] The Court of Appeals used the same phrase "it seems clear" or a variant thereof four times in a single page of the official reporter (659 F.2d at 974) in its discussion of injury. No citation to the trial record was made in that entire discussion. See Pet. App. at 22-25.

fringed" program. A study commissioned by the Federal Communications Commission confirms this reasoning.

> Because both major rating services—A.C. Nielsen and Arbitron—now include an indication of VCR use, this time-shift phenomenon should actually be an asset to the networks and broadcasters. Shows which would have been missed can now be recorded for later viewing. Because rating services are prepared to report such time-shifting, broadcasters should actually be helped because this consumer convenience. An audience that was previously unavailable to them is now viewing, and the viewing is properly attributed in audience reports.[14]

This Court has decided three major cases in which the plaintiffs sought to impose copyright liability burdening technological advances that expanded the audience for the plaintiffs' broadcast copyrighted works. Each time no copyright violation was found. In each case, the existing market structure was found to be capable of compensating copyright owners for the use of their works.

In both *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*, 415 U.S. 394 (1974) and *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), this Court refused to use the copyright laws to limit reception of broadcast television to those in the initial viewing area. It reasoned that the marketplace always provided compensation for the expanded viewing audience created when broadcast signals are retransmitted through community antenna television systems ("CATV").

Both CATV systems and VTRs are similar in that they significantly expand viewing audience size. The *Tele-*

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[14] Federal Communications Commission—Network Inquiry Special Staff, Appendix by D. Agostino "Home Video: A Report on the Status, Projected Development and Consumer Use of Videocassette Recorders and Videodisc Players" p. 61 (1980).

prompter and *Fortnightly* discussions of CATV systems clarify these similarities:

> Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals. . . . CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer.

Fortnightly Corp. v. United Artists Television, 392 U.S. at 399 (footnotes omitted).

> By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor. When a broadcaster transmits a program under license from the copyright holder he has no control over the segment of the population which may view the program—the broadcaster cannot beam the program exclusively to the young or to the old, only to women or only to men—but rather he gets paid by advertisers on the basis of all viewers who watch the program.

Teleprompter Corp. v. Columbia Broadcasting Systems, Inc., 415 U.S. at 412.

The use of VTRs for time-shifting is analogous to the employment of cable television equipment—television broadcasts are made available to persons who would otherwise not have seen them. As with CATV, VTRs expand the audience for the purportedly infringed broadcast and the copyright holder can receive greater recompense through advertising revenues.

Similarly, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), this Court rejected an infringement claim brought against a retail store owner who played radio broadcasts of copyrighted works throughout

his retail store. The Court found that the existing market mechanisms already compensated the copyright owner.

> The petitioners have not demonstrated that they cannot receive from a broadcaster adequate royalties based upon the total size of the broadcaster's audience. On the contrary, the respondent points out that generally copyright holders can and do receive royalties in proportion to advertising revenues of licensed broadcasters, and a broadcaster's advertising revenues reflect the total number of its listeners, including those who listen to the broadcasts in public business establishments.

422 U.S. at 163 n.14. Relying on *Fortnightly* and *Teleprompter*, the Court concluded that there is no copyright infringement when audience size is expanded without economic harm to the copyright owner.

The principle emerging from these cases is that use of new devices enlarging the audience for broadcast copyrighted works is non-infringing if the copyright owner is not injured or the marketplace can provide for compensation for the use. The trial court's findings of fact that govern the case at bar establish that the plaintiffs are *not* injured through VTR usage and, in fact, the marketplace can measure the expanded audience from time shifting and provide substantial economic benefits to copyright holders through increased advertising revenues generated by the increased audience.

The cumulative effect as VTR ownership expands is to increase significantly the copyright holder's market. Indeed, the "genius of Betamax" is that it converts a potential market for the "infringed" program into actual viewers by allowing time shifting. Similarly, the growing use of VTRs to display prerecorded videotapes has created an entirely new market for copyright holders that

brings many hundreds of millions of dollars.[15] Other VTR uses, *e.g.*, home movies, teletext, electronic photography, present no copyright dangers and may also create new markets for copyright holders.

Even so-called "librarying" was found by the district court not to injure copyright holders (Pet. App. at 112-13).[16] In sum, *a priori* reasoning suggests that VTR use benefits copyright holders and converts potential markets into actual viewers. Moreover, the cumulative effect as VTR usage grows will be to increase these benefits. Most importantly, however, the evidence at trial and the trial court's findings support this same conclusion. The Court of Appeals has created an irrebuttable presumption of injury that is contrary both to fact and logic.

The Court of Appeals declared that it need not reach the issue of injury given the intrinsic use of VTRs. The Court of Appeals did not explain why this was the case. The entire equitable, balancing test nature of the fair use doctrine is perverted by the holding that a use which benefited the copyright holder can not be a fair use.

III. CONCLUSION

The issue before this court is whether the judicial and statutory doctrine of fair use encompasses home videotaping of broadcast works. EIA/CEG respectfully submits that it does.

It is fair, reasonable and equitable for individuals to videotape and preserve temporarily copyrighted works,

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[15] Approximately six million prerecorded video cassettes were sold in the United States in 1981 at an estimated wholesale value of over $400 million. *See, e.g.*, Variety, March 10, 1982, pp. 35-36.

[16] Moreover, the dramatic growth of prerecorded video tapes has greatly reduced any incentive for librarying. Prerecorded tapes have no commercials, they are not edited for television, their quality is superior to home "off-air" taping, and they are cheaper to rent than the cost of blank tape for home taping.

provided such works are not used for commercial purposes. When the available evidence indicates that copyright owners are likely to benefit economically from this usage, the use is facially reasonable. On three occasions this Court has consistently held that the copyright laws should not be used to burden technology which expands the broadcast audience for the copyright holder. A reasoned analysis of the fair use statutory criteria and the will of Congress combined with the numerous factors courts have traditionally considered when applying this equitable doctrine mandate the conclusion that home videotaping is fair usage.

For all the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

J. EDWARD DAY
(Counsel of Record)

WILLIAM K. BLACK
GARY J. SHAPIRO
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-6600

Attorneys for Amicus Curiae
Consumer Electronics Group of the Electronic Industries Association

Amicus Brief

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Supreme Court of the United States

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SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

—v.—

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF CREATORS AND DISTRIBUTORS OF PROGRAMS IN SUPPORT OF RESPONDENTS

STUART ROBINOWITZ
(Counsel of Record)
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
(A partnership including
professional corporations)
345 Park Avenue
New York, New York 10154
(212) 644-8000

Attorneys for Amici Curiae

Of Counsel:

STEPHEN D. D. HAMILTON
ANDREW J. PECK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1687

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

—v.—

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF CREATORS AND DISTRIBUTORS OF PROGRAMS IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI CURIAE

This brief is filed in support of respondents by the 73 *amici* listed in Appendix A hereto.[1] *Amici* create or distribute feature films, weekly entertainment series, children's programs, dramas and comedies, documentaries, operas and ballets. *Amici* and respondents produce or distribute most of the programs that appear on television today. They create or distribute more than 90% of the prime-time programs on the commercial networks, 18 of the top 20 syndicated shows for individual television stations, approximately 60% of the PBS National Program Service and almost 100% of PBS' children's programs.[2] *Amici*'s programs cover a broad cross section of

1 The consents of the parties are on file with the Clerk of the Court.

2 See Appendices A, B and C hereto.

copyrighted material ranging from *Masterpiece Theatre* to *National Geographic Specials* to *Sesame Street* to *The Paper Chase* to *Dallas* to *Chariots of Fire*.

Sony threatens to erode the value of *amici*'s property rights in those programs by marketing a videotape machine (or "VTR") called Betamax, which makes millions of unauthorized copies of *amici*'s intellectual property. *Amici*'s copyrights are the *sine qua non* of the multi-billion dollar VTR industry.

At the time of trial, there were only about 130,000 Betamax VTRs. Today, there are about 4,500,000 VTRs. By the end of the decade, it is estimated that there will be 30,000,000 to 40,000,000 VTRs. Wholesale copying of *amici*'s programs by millions of VTRs will pre-empt critical ancillary markets and seriously jeopardize *amici*'s legitimate property rights.

BACKGROUND FACTS

Production and Distribution of Cultural Programs for Public Television

Amici include some of the leading creators and distributors of programming for public television—stations that are among the major production centers for PBS, The Children's Television Workshop, and significant outside sources of cultural material (*e.g.*, The British Broadcasting Corporation, Lincoln Center and the Metropolitan Opera). *Amici*'s productions, described in Appendix A, require the creative efforts of the world's outstanding talent and are extremely expensive to produce. Creators of such programs cannot hope to recoup their high production costs from public television, but must look to grants from the public and private sectors—funding which is rapidly drying up.[3]

As a result, producers increasingly depend on the opportunity to exploit their works in ancillary markets such as prerecorded cassettes and discs, cable television and emerging technologies. A recent study by The Carnegie Corporation

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3 *See* H.R. Rep. No. 82, 97th Cong., 1st Sess. 7, 9 (1981); *Budget Seen Imperiling Public Broadcasting*, N.Y. Times, Feb. 11, 1982, at C36, col. 1.

concluded: "Many of public television's greatest successes are programs that have great shelf life and that consumers may wish to own. That is particularly true with musical performances, children's programs, 'how to' programs, some documentary and informational shows."[4] In reducing federal funding for public television, Congress stressed "the extreme importance of alternative sources of financing to the long-term health of public telecommunications."[5]

But alternative sources of financing and ancillary markets are increasingly pre-empted as VTRs proliferate. For example, a taper who copied the recent performance of *Madama Butterfly* by the New York City Opera on Great Performances, "Live From Lincoln Center," or a stellar performance by the Metropolitan Opera or Pavarotti will have a treasured copy for his or her library and little incentive to purchase or rent a prerecorded videocassette or to buy a record of that performance. For some, taping may replace live attendance. Similarly, those who tape *Brideshead Revisited* or *Cosmos* or great performances of Shakespeare's plays, will have little motivation to purchase or rent prerecorded videocassettes.

The growth of VTRs—from 4.5 to 40 million—will exacerbate the serious budgetary problems already faced by public television and by *amici* and other creators of programming for that medium. Free marketplace alternatives are being destroyed by wholesale taping.

Production and Distribution of Theatrical Motion Pictures

Theatrical feature films are the most complex and expensive form of copyrighted material that exists today. The average investment in a motion picture ranges from $10,000,000 to $20,000,000. Production of features is a high risk affair. Only about two out of ten films recoup their investment from theatrical exhibition. Accordingly, post-theatrical or ancillary markets—the markets most directly threatened by VTRs—are critical to the vitality of the creative community.

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4 S. Mahoney, N. Demartino & R. Stengel, *Keeping Pace With the New Television* 182 (1980); *see also id.* at 177-85.

5 H.R. Rep. No. 82, 97th Cong., 1st Sess. 15 (1981).

After initial theatrical exhibition, motion pictures are generally licensed to pay cable or over-the-air pay television for exhibitions over several months or more. Thereafter, popular films are licensed to the television networks for two or more exhibitions for a period of several years. Then, films are typically syndicated to individual television stations across the nation for many exhibitions under multi-year licenses. In addition, feature films have recently been sold or rented to consumers in the form of prerecorded discs or videotapes—an emerging market with significant growth potential. Feature films are also licensed for performances in the home-rental or 16 mm market, on college campuses, at other institutions and in various other non-theatrical forums. Finally, some successful films are reissued for theatrical exhibition.

Today, television critics are already recommending the best movies to tape when publishing weekly broadcast schedules.[6] Massive videocopying of feature films by millions of VTRs threatens all ancillary markets. For example, a VTR can duplicate a popular new motion picture when it is exhibited on pay cable or pay TV in its complete unedited form without commercials; or it can make a copy of a recent film on its network debut and erase the commercials. Such widespread copying by millions of VTRs will undermine the value of a motion picture on its network run because the commercials are typically deleted. Wholesale duplication will also have a negative impact on the sale or rental of prerecorded tapes and discs of films that are copied, the subsequent exhibitions of those films on television or in theatrical re-releases, and home and other non-theatrical 16 mm rentals. If a VTR owner copies *On Golden Pond* or *Star Wars* or *Kramer vs. Kramer* or *Superman*, that taper will have little incentive to purchase or rent a prerecorded tape or disc of that film, or to view the film when it later appears on television networks or individual stations, or to attend a theatrical re-release.

By pre-empting vital ancillary markets, massive videocopying will erode the producers' ability to undertake the heavy

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6 *See, e.g.*, Chicago Tribune (TV Week), Mar. 14, 1982, at 32; Mar. 28, 1982, at 36; Apr. 18, 1982, at 32.

investments and high risks necessary to create new and innovative motion pictures. That will lead to a curtailment in the diversity of films available to the public, contrary to the copyright law's basic goals.

Production and Distribution of Television Programs

Like theatrical motion pictures, television series are a highly complex and expensive form of copyrighted material. Today, a made-for-TV movie may cost $2,500,000 to $3,000,000 to produce; a one-hour series, $700,000 to $1,000,000 per episode; and a regular half-hour TV series, $300,000 to $400,000 per episode. Television production is an extremely risky venture. Programs, even the hits, rarely recoup their large investments from network runs and, as a result, producers depend for survival on post-network exhibitions on individual stations in the syndication market and other ancillary markets (Pet. App. 37).[7]

Wholesale copying of new television programs directly threatens the syndication and other ancillary markets that are so critical to television producers. A Betamax owner who makes (or borrows) a taped copy of *Hill Street Blues* or a musical special or a made-for-TV movie such as *Brian's Song* or *The Autobiography of Miss Jane Pittman* will have no incentive to watch that program when it is later telecast by local stations across the nation; and tapers will also have no incentive to buy or rent prerecorded tapes or discs of those highly-acclaimed television programs (such as *Roots*) that are offered in those formats.

By undermining ancillary markets, widespread off-air taping will make creators of television programs reluctant to take the substantial risks necessary for the production of new and innovative programs. That will mean fewer programs, less

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7 "A syndication requires approximately 60-120 episodes, which means 3-5 years of successful first run network exhibitions if the package is all of one series." (Pet. App. 37.) Very few series survive that long today because the networks make frequent scheduling changes in the race for high ratings. *See* Grover, *Delayed Payoff TV Series Only Become Profitable for Producers Upon Syndication, Years After They Are Made*, Wall St. J., Dec. 27, 1977, at 26, col. 1.

experimentation and a decrease in diversity of choices for the public.

The Destructive Impact of Unauthorized Videocopying on the Private Property Rights of Creators of Programs

As noted above, today's population of 4.5 million VTRs[8] is projected to increase to 30 to 40 million by 1990.[9] Sales are increasing at an explosive rate: 1980 (800,000), 1981 (1,400,000), 1982 (2,100,000).[10] VTRs "are selling at a two-million a year clip" and are "now Japan's most important consumer electronics export, eclipsing even color television as a revenue producer."[11]

The average Betamax owner has 25 or more tapes (Pet. App. 39, 47). Today there are approximately 112.5 million tapes to appropriate *amici*'s intellectual property.[12] If there are 40 million VTRs by the decade's end and a typical owner has 25 tapes, then there will be 1 billion tapes capable of piracy—tapes that could, for example, make 4 billion copies of full-length motion pictures. One billion 8-hour cassettes would have enough magnetic tape to circle the globe 16,000 times. As prices for VTRs continue to decline with mass production,[13] the

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8 Brief of General Electric Co., Matsushita Electric Corp., *et al.* as *Amici Curiae* at 20.

9 National Economic Research Associates, Will Cable Save The Arts?, at Table 2 (1981); Robert N. Nathan Associates, An Assessment of the Impact to Consumers from a Royalty Fee on Videocassette Recorders and Blank Tape 26 (1982); *see also* Crooks, *Just Who's Right On The Home Taping Issue*?, L.A. Times, Apr. 12, 1982, at 8, col. 1; Brief of *Amici Curiae* Minnesota Mining *et al.* at 2; Brief of *Amici Curiae* Virginia Citizen's Consumer Council, Inc. *et al.* at 24.

10 *1982—Year of the Big Dump*, 22 Television Dig., Jan. 4, 1982, at 9; *VCR Sets Weekly Sales Record*, 22 Television Dig., Sept. 20, 1982, at 9.

11 Lachenbruch, *The Wide World of Video*, N.Y. Times, Sept. 26, 1982, § 6 (Magazine), pt. 2 at 42, 46.

12 *I.e.*, 25 tapes x 4,500,000 VTRs.

13 Retail prices of VTRs have dropped from approximately $1,000 to $400 for economy models in only about four years. N.Y. Times, Oct. 14, 1982, at A29, col. 5, and Oct. 20, 1982, at B5, col. 6 (videorecorder advertisements).

nation will be swamped with this technology and vulnerable copyrighted material will fall prey to easy and relatively inexpensive home duplication on a wholesale basis.

These are not imaginary fears. Because of home audiotaping of records, which began earlier and is more widespread than videotaping, the record industry is losing sales of $1 billion per year according to a recent economic study by Dr. Alan Greenspan.[14] Beverly Sills, General Director of the New York City Opera, recently testified that taping has caused a one-third decline in the number of new records released in the past several years, thereby decreasing the diversity of choices available to the public.[15] Widespread videocopying will have a pernicious impact on the creative community—on authors, performers, directors, producers and other talent.

In passing the 1976 Copyright Act, Congress warned: "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented."[16] Similarly, the Register of Copyrights recently declared that massive videocopying will "prejudice the integrity of . . . emerging markets."[17] And a British report predicted that "there will be a free-for-all with copyright owners getting no benefit."[18] That is the issue at stake in this test case.

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14 Statement of Alan Greenspan 5 (Apr. 21, 1982), *to be reprinted in Hearings on S. 1758 before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

15 Statement of Beverly Sills, Chairperson, Coalition to Save America's Music 3 (Apr. 21, 1982), *to be reprinted in Hearings on S. 1758 before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

16 S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975) [hereinafter cited as "Senate Report"]. To same effect, see H. Rep. No. 83, 90th Cong., 1st Sess. 35 (1967).

17 Statement of David Ladd, Register of Copyrights, before the American Bar Association, Section of Patent, Trademark and Copyright Law 5 (Aug. 10, 1982) [hereinafter cited as "Register's 1982 ABA Statement"].

18 Report of the Committee to Consider the Law on Copyright and Design, Cmd. 6732 at 81 (1977) [hereinafter cited as "Whitford Report"].

Sony reportedly believes—and understandably so—that "it has a razor-and-blades situation with the Betamax machine and the profitable tapes it requires."[19] Sony apparently looks to the continuous sales of large quantities of blank tapes as a major source of profits over the long run.[20] But the razor and the blades—the VTRs and tapes—function only by appropriating the intellectual property of *amici* and other creators. As the Ninth Circuit observed:

> Videotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Virtually all television programming is copyrighted material. (Pet. App. 25-26 (footnote omitted).)

To obscure those facts, Sony claims (Br. 4-5) that Betamax is merely a "time-shifting" machine that allows viewers to adjust to the scheduling practices of broadcasters. But Betamax is far more. It has also been designed and advertised to "*build a library*" of popular films, outstanding television programs and classic performances (Pet. App. 41-42 (emphasis added)). If Betamax were merely a "time-shifting" device, consumers would need only a handful of tapes because they are erasable and reusable. But VTR owners typically own about 25 or more tapes costing a total of approximately $500 (Pet. App. 39, 47). The three Betamax owners who were defendants or witnesses in this case had collections of 340, 170 and 100 tapes (Pet. App. 43-46).

Viewers would not be buying so many blank tapes at such great expense if VTRs were simply "time-shifting" machines. Those tapes (the blades for Sony's razors) are being sold by Sony—at substantial profit—to create libraries of outstanding programs. For example, all Betamax tapes were sold out on the eve of the television debut of *Gone With The Wind*.[21]

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19 *Why Sony's Betamax Has MCA Seething*, Bus. Wk., Nov. 29, 1976, at 29.

20 More than 30 million blank videotapes will be sold this year. *Video Bootleggers: Bane of Film Studios*, N.Y. Times, Oct. 23, 1982, at 41, col. 4. Sales of blank tapes, which rose 60% in the last year, are expected to reach $5 billion by 1985. Greenberg, *Home Entertainment's Software Payoff*, Forbes, Mar. 1, 1982, at 109, 110.

21 *Why Sony's Betamax Has MCA Seething*, *supra*, at 29.

After reviewing surveys in the field conducted by Sony and others, the Register of Copyrights recently concluded that "[by] any calculation . . . substantial librarying is occurring."[22] Sony seeks to gloss over this fact because Sony[23] and its *amici* supporters virtually concede that "librarying" violates the copyright laws. Sony's allies call librarying a "noxious" practice that "must be tolerated"[24] and a "complex question."[25] The VTR industry wants to avoid the librarying issue, but its advertisements urge consumers to "*build a library*" (Pet. App. 41-42 (emphasis added)).

In any event, even when a viewer "time-shifts," he is making a tangible and fixed *copy* of an author's intellectual property in violation of the Copyright Act. When time-shifting, a viewer is using the creative property of *amici* for his own benefit without the payment of any compensation.

Beyond this, time-shifting by millions of VTRs threatens serious injury to copyright owners as VTRs multiply. When time-shifting, viewers generally delete commercials by pressing the remote control "pause switch" when recording or the "fast-forward" button when playing back the tape. According to Sony's own interpretation of the various surveys in evidence, about 40% of playbacks had commercials deleted (Sony Br. 14 n.19). An up-to-date survey submitted to Congress indicates that today more than 80% of VTR owners delete commercials.[26] Devices are being advertised that allegedly eliminate commercials automatically.[27] Advertisers will not pay

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22 Statement of David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services 9 (Apr. 21, 1982), *to be reprinted in Hearings on S.1758 before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) [hereinafter cited as "Register's Statement before the Senate Judiciary Comm."].

23 Pet. 17, 19 n.19; *see also* Sony Br. 29, 31 n.32.

24 Brief of *Amici Curiae* Minnesota Mining *et al.* at 29.

25 Brief of *Amicus Curiae* Sanyo Electric, Inc. at 2 n.2.

26 Media Statistics, Inc., Third Annual Diary Study of VCR Homes, Fall 1981, B-20.

27 Videophile, Dec., 1979, at 71, 75.

for audiences that do not see commercials and, as Congress has stressed, this "harms" the copyright proprietor "whose compensation for [his] work is directly related to the size of the audience that the advertiser's message is calculated to reach."[28]

Time-shifting also means that programs often do not reach the particular audiences or specific time periods for which the programs were targeted. Advertisers, for example, will not pay for useless exposure such as snow tire commercials in videotapes recorded in the winter and played back in April.

Thus, whether VTRs are used for "time-shifting" or "librarying," the value of the creator's intellectual property is being eroded without compensation. The foregoing factors—wholesale copying, the pre-emption of ancillary markets, and the deletion of commercials—all undermine the economic basis for the creation of programs for television.

While Sony and its allies now claim *carte blanche* to reap a windfall from the creative property of others, Sony previously paid lip service to copyright principles and to normal marketplace obligations to pay for what it was taking. Thus, when it was launching the Betamax business, Sony reportedly suggested paying royalties on blank tapes.[29] Moreover, for approximately ten years until about 1975, Sony placed warnings on its recording devices, such as: "THIS VIDEOTAPE RECORDER IS NOT TO BE USED TO RECORD COPYRIGHTED WORKS."[30]

ARGUMENT

Summary of Argument

—The Copyright Act prohibits the copying of *amici*'s property—their motion pictures, television programs and taped live

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28 H.R. Rep. No. 1476, 94th Cong., 2d Sess. 94 (1976) [hereinafter cited as "House Report"], *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5708.

29 *Schein of Sony Says Tax on Blank Cassettes May Be Answer for Copyright Holders*, 11 ETV Newsletter, Apr. 11, 1977, at 1.

30 Pet. App. 42, 94; *see also* PX 166, 167, 170; R. 638-44; Sony Br. 3 n.4.

performances. Although fully aware of VTRs when it passed the new statute in 1976, Congress significantly did *not* include home off-air taping in the more than thirty exemptions in the new Act.

—Wholesale videocopying is not "fair use." That doctrine was designed to stimulate creativity by allowing a second author to borrow an excerpt from the work of an earlier author to further his own creative efforts.

—Sony is guilty of contributory copyright infringement because it designed and advertises VTRs to copy the most popular copyrighted programs on television. That is Sony's main sales pitch.

—There is no basis for Sony's request for an advisory opinion as to whether the district court has the power to order Sony to pay a reasonable continuing royalty in lieu of the usual injunction. That issue is not ripe for review because the district court has not yet considered the question of a remedy. In any event, a reasonable and continuing royalty would be a pragmatic remedy because copyright proprietors cannot—and do not wish to—pursue millions of VTR owners. Sony opposes this remedy *because* it is practical.

The Ninth Circuit's opinion is in accord, not only with the equities and the law, but also with the universal views of leading copyright experts here and abroad—including David Ladd, the present Register of Copyrights;[31] Professor Melville Nimmer, the nation's foremost copyright scholar;[32] leading authorities in the international copyright community;[33] and law journal commentators.[34]

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31 *See* Register's Statement before the Senate Judiciary Comm., *supra*; Register's 1982 ABA Statement, *supra*; and 127 Cong. Rec. H5148-49 (1981) (remarks of David Ladd, Register of Copyrights).

32 *See* 3 *Nimmer on Copyright*, § 13.05[F][5] at 13-93 to -102, § 12.04[A] at 12-40 to -41 (1982 ed.).

33 *See* Report of Berne Union Working Group on the Legal Problems Arising from the Use of Videocassettes and Audiovisual Discs, *reprinted in* Copyright, April, 1977, at 87, ¶¶ 32-34; Whitford Report, *supra*, at 75.

34 *See, e.g.*, Marsh, *Betamax and Fair Use: A Shotgun Marriage*, 21 Santa Clara L. Rev. 49 (1981); Note, *The Betamax Case: Accommodating*

I.

VIDEOCOPYING OF MOTION PICTURES AND TELEVISION PROGRAMS VIOLATES *AMICI*'S INTELLECTUAL PROPERTY RIGHTS PROTECTED BY THE COPYRIGHT LAW.

Copyright is a *property* right. From its earliest origins in Anglo-American law, copyright has protected the intellectual *property* of authors and other creators in order to stimulate intellectual creativity.[35] Thus, the Constitution gives Congress the Power: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[36]

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered. (*Mazer* v. *Stein*, 347 U.S. 201, 219 (1954).)

A. Videocopying Violates the Copyright Act's Absolute Ban Against Copying and Does Not Come Within Any of the Act's Special Exemptions

Videocopying violates the exclusive property right of a copyright owner to make copies of his audiovisual work under

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Public Access and Economic Incentive in Copyright Law, 31 Stan. L. Rev. 243 (1979); Note, *Universal City Studios, Inc.* v. *Sony Corp.*: *"Fair Use" Looks Different on Videotape*, 66 Va. L. Rev. 1005 (1980); Note, *Copyright—Fair Use—Recording of Televised Copyrighted Work in the Home*, 55 Tulane L. Rev. 1295 (1981); Note, *Copyright: Gone With the Betamax?*, 8 Rev. L. & Soc'l Change 45 (1978).

35 *See generally Millar* v. *Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (1769); *Donaldsons* v. *Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (1774); *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591 (1834); *The Federalist* No. 43 (J. Madison). Also see 1 *Nimmer On Copyright* § 1.03[A] at 1-30 to -30.2.

36 U.S. Const. art. I, § 8, cl. 8.

Section 1 of the 1909 Copyright Act (former 17 U.S.C. § 1) and under Section 106(1) of the 1976 Act (17 U.S.C. § 106(1)).[37]

After setting forth the copyright proprietor's exclusive property rights in absolute terms in Section 106, the new Act carves out a series of exemptions designed primarily to accommodate new technologies (Sections 108 through 118).[38] There are more than thirty exemptions.[39] Not a single one of those exemptions permits home off-air copying, although Congress was fully aware of VTRs. The new Act's creation of more than thirty exemptions negates the notion of a *sub silentio* exemption for videocopying. *Diamond* v. *Chakrabarty*, 447 U.S. 303, 308 (1980); *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 173 n.18, 188 (1978). That should be dispositive.

B. The Fair Use Defense Is Not Applicable

Sony seeks refuge under the fair use doctrine. But it is not germane here.

Fair use—devised by the courts more than 110 years ago[40] and now codified in Section 107 of the new Act—is designed to

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37 There is no merit to Sony's claim that taping is not copying but a mechanical and temporary step for later viewing. "Librarying" involves the making of *permanent* copies. Even when time-shifting, Betamax owners make copies under the Act, which defines copies as "material objects . . . in which a work is fixed . . . and from which the work can be perceived . . . with the aid of a machine" (17 U.S.C. § 101). "[R]eproduction on magnetic tape" is copying "even though the tape is later erased." Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, in Copyright Law Revision, Part 6, 89th Cong., 1st Sess. 17 (Comm. Print 1965) [hereinafter cited as "Register's 1965 Report"]; *see also Encyclopaedia Britannica Educational Corp.* v. *Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (old and new Copyright Acts prohibit off-air videotaping of educational programs even for time-shifting); *Walt Disney Productions* v. *Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969).

38 This is the first time in almost two centuries that the copyright law has set forth a long list of exemptions. *See* L. Seltzer, *Exemptions and Fair Use in Copyright* 11-12 (1978).

39 *Id.* at 52 & n.123.

40 *See Folsom* v. *Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) (Story, J.); *Lawrence* v. *Dana*, 15 F. Cas. 26 (C.C.D. Mass. 1869) (No.

serve the constitutional goals of copyright by allowing scholars, critics and others to use limited excerpts from prior copyrighted material in order to further their own *creative* endeavors. The courts established the defense "to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster." *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).[41]

Thus, Section 107 characterizes fair use as involving "purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research."[42] Those activities bear no resemblance to VTRs' duplication of *Jaws* or *M*A*S*H* or *Julia Child* for entertainment and convenience. Since VTR copying has nothing to do with creativity—the *raison d'etre* for fair use—the concept is not relevant here. If it were, Sony could not satisfy a single one of the four criteria set forth in Section 107.

8,136); *see also* B. Kaplan, *An Unhurried View of COPYRIGHT* 67 & n.90 (1967).

41 *See also Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Benny* v. *Loew's Inc.*, 239 F.2d 532, 536 (9th Cir. 1956), *aff'd by an equally divided Court sub nom. Columbia Broadcasting System* v. *Loew's Inc.*, 356 U.S. 43 (1958); *Rubin* v. *Boston Magazine Co.*, 645 F.2d 80 (1st Cir. 1981); Seltzer, *supra*, at 24; 3 *Nimmer On Copyright* § 13.05 at 13-54, § 13.05[A] at 13-58 to -63 & n.23.3, § 13.05[B] at 13-65 to -71.

42 The House and Senate Reports accompanying the new Act give examples: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported." Senate Report 61-62; House Report 65.

(1) *Purpose and character of use*: Home videocopying is not designed "for nonprofit educational purposes" or other scholarly pursuits within the meaning of Section 107. It is designed for librarying or convenience. Nobody defends librarying; and the 1975 Senate Report declares "*[t]he committee does not intend to suggest . . . that off-the-air recording for convenience would under any circumstances, be considered 'fair use.'* "[43]

(2) *The amount and substantiality of the portion used in relation to the copyrighted work as a whole*: This factor is also fatal. Fair use permits copying of small excerpts, not complete works verbatim.[44] For example, even in the case of educational copying of works—which merits more hospitable treatment than home VTR copying under the fair use defense—there is no privilege to reproduce "a sizable integrated work published as an entity (a novel, treatise, monograph, and so forth)." (Senate Report 64.)

(3) *Nature of the copyrighted work*: This factor also weighs heavily against Sony. First, fair use is generally less applicable to creative and imaginative works (such as movies and TV shows) than to scientific or informational studies.[45] Second, the

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43 Senate Report 66 (emphasis added).

44 *See* 3 *Nimmer On Copyright* § 13.05[A] at 13-64, § 13.05[D] at 13-72.5 to -72.6; *Meeropol* v. *Nizer*, 560 F.2d 1061, 1069-71 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Rosemont*, 366 F.2d at 310; *Walt Disney Productions* v. *Air Pirates*, 581 F.2d 751, 756-58 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Wihtol* v. *Crow*, 309 F.2d 777 (8th Cir. 1962); *Leon* v. *Pacific Telephone & Telegraph Co.*, 91 F.2d 484, 486 (9th Cir. 1937); *Benny*, 239 F.2d at 536; *Iowa State*, 621 F.2d at 61; *Encyclopaedia Britannica*, 542 F. Supp. at 1156; *Marvin Worth Productions* v. *Superior Films Corp.*, 319 F. Supp. 1269 (S.D.N.Y. 1970); *cf. Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-76 (1977) ("The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance.").

45 3 *Nimmer on Copyright* § 13.05[A][2] at 13-63; Seltzer, *supra*, at 33-34. *Compare, e.g., Iowa State*, 621 F.2d at 57, *and Benny*, 239 F.2d at 536, *with, e.g., New York Times* v. *Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977).

more that a work such as a feature film or television program depends on revenues from subsequent uses, the narrower the scope of permissible fair use.[46] Finally, Congress has shown "special solicitude for" (Pet. App. 8), and given a particularly high level of protection to, audiovisual works such as movies and television programs because they are "exceptionally vulnerable to copyright impairment."[47] Thus, audiovisual works are generally not included in the exemptions in Sections 108-118.[48]

(4) *The effect of the use upon the potential market for or value of the copyrighted work*: The test is whether the unauthorized use of the copyright work *tends* to threaten injury to *potential* markets for the work.[49] Since fair use is a defense to infringement, the defendant has the burden of proof in negating this factor.[50]

Copying by 4.5 million VTRs (with 112.5 million tapes) today and by 40 million VTRs (with 1 billion tapes) by the decade's end clearly threatens potential injury to *amici*. To repeat, Congress has warned:

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46 *See* Senate Report 64.

47 H.R. Rep. No. 83, 90th Cong., 1st Sess. 61 (1967). "This is so because the capital investment is high, the risk of loss on any given work is large, and unauthorized copies tend to satisfy fully the demand for the lawful copy." Register's Statement before Senate Judiciary Comm., *supra*, at 25.

48 *See, e.g.*, Sections 108, 110, 112, 118.

49 3 *Nimmer On Copyright* § 13.05 [E][4][c] at 13-84; *Iowa State*, 621 F.2d at 62; *Encyclopaedia Britannica*, 542 F. Supp. at 1169; *Roy Export Co. v. Columbia Broadcasting System*, 503 F. Supp. 1137, 1145-46 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3254 (Oct. 4, 1982); *Meeropol*, 560 F.2d at 1070; *Meredith Corp. v. Harper & Row Publishers, Inc.*, 378 F. Supp. 686, 689 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974).

50 *Encyclopaedia Britannica*, 542 F. Supp. at 1170 & n.12; *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351, 360-61 (N.D. Ga. 1979); 3 *Nimmer on Copyright* § 13.05[E][4][a] at 13-84.

> Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented.[51]

Congress has also declared:

> With certain special exceptions (use in parodies or as evidence in court proceedings might be examples) a use that supplants *any part* of the normal market for a copyrighted work would ordinarily be considered an infringement.[52]

As the Ninth Circuit observed, VTR copies "are used for the *same* purpose as the original."[53]

The Register of Copyrights, stressing Section 107's specific reference to the impact on *potential markets*, recently declared that this language "underscores the need to secure future markets from pre-emption" in a period of rapid technological change; that Congress, in passing the new Act, "sought to avoid unanticipated, future, erosions of authors' rights, as had occurred under the 1909 Act;" and that "*[u]nauthorized off-air taping prejudices the integrity of other emerging markets.*"[54]

In short, the reasons for rejecting Sony's fair use defense are overwhelming. Indeed, a recent decision rejected a school's defense of fair use in connection with off-air taping of instructional films from an educational station (including claims of "time-shifting"). *Encyclopaedia Britannica Educational Corp.* v. *Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982). This case is *a fortiori*. Here, the copying is primarily for purposes of amuse-

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51 Senate Report 65.

52 Senate Report 65 (emphasis added).

53 Pet. App. 23 (emphasis added).

54 Register's 1982 ABA Statement, *supra*, at 3, 5 (emphasis added). Similarly, the Register's 1965 Report, *supra*, at 17, stated:

> A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.

ment, not education, and the scope of the copying is much more extensive, involving millions of copies across the entire country.

C. Sony's Claims as to Legislative Intent Are Specious

Although Section 107 was "intended to restate the present judicial doctrine of fair use"[55] and Sony cannot find a single case to support its position,[56] Sony inexplicably argues that Congress really wanted home videotaping to be treated *as if* it were fair use. Sony stakes its entire case (Br. 35-37 & nn. 39-42) on an isolated paragraph in the 1971 House Report on the record piracy amendment, and some related colloquy,[57] to the effect that the amendment was not intended to reach private home audio taping of phonograph records. Sony's reliance is misplaced.

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55 Senate Report 62; House Report 66.

56 Sony and its colleagues rely on *Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975) (per curiam). But even the district court recognized that *Williams & Wilkins* "has little precedential value" (Pet. App. 73). There, the Court of Claims permitted government libraries to copy medical articles from learned journals for critical medical research. That is a far cry from massive copying of television shows for "librarying" and convenience. Moreover, the court in *Williams & Wilkins* stated that its decision was merely "a 'holding operation' until Congress" acted on the pending revision of the Copyright Act (487 F.2d at 1363). Shortly thereafter, Congress did act. It sharply limited library copying for scholarly purposes and, significantly, did not authorize copying of movies or TV shows (Section 108). The Senate Report, after explaining Section 108's strict limitations on library copying, stated that *Williams & Wilkins* "failed to significantly illuminate the application of the fair use doctrine." Senate Report 71. To same effect, see 3 *Nimmer On Copyright* § 13.05[E][4][c] at 13-83 to -87.

57 The colloquy cited by Sony (Br. 35-37 & nn. 39-42) focused on two points—the difficulty of detecting record taping in individual homes and concern about privacy rights. But, as explained by Professor Nimmer, those considerations are not present if, as has been suggested, a royalty is imposed on Sony and the other importers and manufacturers of VTRs and tapes. 3 *Nimmer On Copyright* § 13.05(F) at 13-101 to -02. Sony's quote from Ms. Ringer (Br. 35 n.39) is highly selective. On the pages cited, she also warned Congress of the "crunch" that would occur in the future and of the "quantum increase [in bootlegged movies] when video cassette recorders are

First, the amendment was an interim measure aimed at stopping commercial piracy, which had reached crisis proportions. The amendment did not purport to deal with home taping. An isolated remark in the House—but not the Senate—Report did not carve out a major exemption in the statutory scheme. In any event, the 1971 legislation[58] and the House and Senate Reports specifically recognized that the amendment had *no* impact whatsoever on motion pictures.[59]

Second, assuming *arguendo* that the 1971 amendment *sub silentio* created a home recording exemption, it was not carried over into the 1976 Act. On the contrary, the 1976 Act gives records broader protection than the interim piracy amendment did.[60] Moreover, when passing the 1976 Act, Congress did not repeat the 1971 House Report's paragraph cited by Sony in any of its Reports, although other portions of the 1971 House Report were repeated verbatim.

Third, assuming *arguendo* that the 1976 Act *sub silentio* adopted an implied 1971 exemption for audio taping, Sony

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freely available." In any event, the isolated 1971 remarks quoted by Sony—as opposed to the more than 400 pages of considered Congressional Reports on the 1976 Act—are not entitled to weight in determining legislative intent as to the 1976 Act. *See Zuber* v. *Allen*, 396 U.S. 168, 186 (1969); *American Trucking Association, Inc.* v. *Atchison, Topeka & Sante Fe Railway*, 387 U.S. 397, 418 (1967); *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945).

58 *See* Sony Br., Appendix E.

59 H.R. Rep. No. 487, 92d Cong., 1st Sess. 5-6 (1971); S. Rep. No. 72, 92nd Cong. 1st Sess. 5 (1971) ("the reproduction of the sound accompanying a copyrighted motion picture is an infringement of copyright in the motion picture").

60 The 1971 amendment merely gave the proprietor of a record the exclusive right "[t]o reproduce *and* distribute to the public." *See* Sony Br., Appendix E, quoting 17 U.S.C. § 1(f) (emphasis added). In contrast, subdivision 1 of Section 106 of the new Act gives a record proprietor the exclusive right "to reproduce;" and subdivision 3 of Section 106 gives him the right "to distribute." Each of those rights is separate and "independent." House Report 61; Senate Report 57. Thus, mere reproduction of sound records and tapes, without distribution, now creates copyright liability. In contrast, the 1971 amendment required *both* copying and distribution, because it was aimed at commercial piracy.

does not explain how that exemption was extended to videotaping of motion pictures and television programs.

Fourth, Sony's claim (Br. 38) that the videotaping question "had been resolved" in its favor by the 1971 piracy statute has a hollow ring because *after* that date Sony continued to place warnings on its VTRs that they were "not to be used to record copyrighted works."[61]

The reality, as noted by Professor Nimmer, is that "[t]here is not and has never been an exemption from copyright liability for audio recording."[62] And the claim that the 1971 amendment sanctioned "videotape copying practices is without authority." *Encyclopaedia Britannica,* 542 F. Supp. at 1182.

In contrast to Sony's bits and pieces of outdated and irrelevant "history," the more than 400 pages of Committee Reports accompanying the 1976 Act are entitled to great weight in determining Congressional intent. *See Zuber* v. *Allen*, 396 U.S. 168, 186 (1969); *United States* v. *UAW-CIO*, 352 U.S. 567, 585 (1957). Those Reports—ignored by Sony—show that Congress was *not* willing to permit massive home videocopying. On the contrary, it allowed extremely limited off-air taping by schools, libraries and certain other institutions, and then only under tight restrictions.

Schools: The House Report states (at 71-72):

> The problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio or television broadcasts has proved to be difficult to resolve. The Committee believes that the fair use doctrine has some *limited application* in this area . . . . (Emphasis added.)[63]

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61 PX 166, 167, 170; R. 638-44; *see also* Pet. App. 42, 94; Sony Br. 3 n.4.

62 M. Nimmer, "The Legal Status of Home Audio Recording of Copyrighted Works" 1, 19 (Apr. 21, 1982), *to be reprinted in Hearings on S. 1758 before the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess. (1982); *see also* 3 *Nimmer On Copyright* § 1305[F][5] at 13-96 n.159.

63 The Report recommended further study by the interested parties. Subsequently, "Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes" were published, sanctioning off-air recording by

The Senate Report also discussed "the special problems involved in the reception of instructional television programs in remote areas," particularly "when such transmissions extend over several time zones within the same state, such as in Alaska."

> Unless individual schools in such states may make an off-air recording of such transmissions, the programs may not be received by the students during the school's daily schedule. The committee believes that the making by a school located in such a remote area of an off-the-air recording of an instructional television transmission for the purpose of a delayed viewing of the program by students for the same school constitutes a 'fair use.' *The committee does not intend to suggest however, that off-the-air recording for convenience would under any circumstances, be considered 'fair use.'*[64]

Libraries: While libraries may not copy audiovisual materials, Congress made a limited exception for off-air taping of news programs for scholars (Section 108(f)(3) and (h)).

> It is intended to permit libraries and archives, subject to the general conditions of this section, to make off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes.[65]
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> * * *
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> Because of the important copyright policy issues inherent in this issue, the exemption has been *narrowly* drafted.[66]

Other exceptions: Off-shore cable systems may videotape off-air under certain circumstances provided, *inter alia*, com-

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nonprofit educational institutions under narrow limitations (127 Cong. Rec. E4750-52 (1981) (remarks and insertion by Rep. Kastenmeier)).

64 Senate Report 65-66 (emphasis added).

65 House Report 77 (emphasis added).

66 Senate Report 69 (emphasis added).

mercials are not deleted and statutory royalties are paid (Sections 111(e), (f)). And, finally, the Conference Committee indicated that limited taping by non-profit institutions for the deaf and hearing impaired would be "fair use" subject to various restrictions.[67]

In addition to the foregoing statements dealing specifically with off-air taping, the Committee Reports contain many other general statements undercutting the notion of an open-ended fair use privilege for massive copying.[68]

Since Congress was unwilling to grant a blanket fair use exemption for educational, scholarly and philanthropic purposes, it surely did not intend to create a blanket exemption for Sony. It is absurd to suggest that Congress—which spent two decades debating the 1976 Act—carved out a major exemption in the statutory framework without a single hearing on the subject.

D. Sony's First Amendment and Related Claims Are Specious

Sony's First Amendment argument (Br. 24-27 & n.26) "is wholly without merit" (Pet. App. 19). There is no separate

67 H.R. Rep. No. 1733, 94th Cong., 2d Sess. 70 (1976) [hereinafter cited as "Conference Report"].

68 The Reports state that language in Section 107 "is not intended to give" taping "any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use" (House Report 66; *see also* Senate Report 62); "a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly;" (House Report 61; Senate Report 58); "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way" (House Report 66; Senate Report 62); "[t]he availability of the fair use doctrine to educational broadcasters would be narrowly circumscribed in the case of motion pictures and other audiovisual works" (House Report 72; Senate Report 65); "[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented" (Senate Report 65); "a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement" under the fair use doctrine (Senate Report 65); "infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by . . . recapturing off the air, or any other method" (House Report 106).

First Amendment defense apart from fair use.[69] The "first amendment is not a license to trammel on legally recognized rights in intellectual property." *Dallas Cowboys Cheerleaders, Inc.* v. *Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979).

Sony's stress on "privacy" rights (Br. 18, 25 & n.26, 28 n.29, 46) is also misplaced. While Congress limited certain rights of a copyright proprietor to *public* performances, displays or distribution (§ 106(3)(4)(5)), it did not do so in the case of copying (§ 106(1)). Thus, *private* copying is proscribed. In any event, *amici* do not seek to invade the privacy of anybody's home. While privacy rights may be relevant in fashioning a remedy, they do not absolve Sony from liability.

There is also no merit to Sony's claim (Br. 24-27) that fair use should be abandoned because the Communications Act of 1934 is designed to give the public maximum access to diverse programming.[70] *Amici* do not seek to limit the public's access to programs, so long as they receive fair compensation for the use of their property. The Copyright and the Communications Acts are in harmony. The Copyright Act does not allow off-air copying without fair compensation; and the Communications Act does not diminish the scope of copyright protection.[71]

Congress and this Court have recently rejected similar claims that increasing the public's access to television justifies taking somebody else's property without compensation. Thus, in the

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69 "Conflicts between interests protected by the first amendment and the copyright laws thus far have been resolved by application of the fair use doctrine." *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *see also Roy Export*, 672 F.2d at 1095; *Iowa State*, 621 F.2d at 61 n.6; *Air Pirates*, 581 F.2d at 758-59; *Sid & Marty Kroft Television* v. *McDonald's Corp.*, 562 F.2d 1157, 1169-71 (9th Cir. 1977); *cf. Zacchini*, 433 U.S. at 577 n.13.

70 Identical arguments were rejected as "farfetched" in *Encyclopaedia Britannica*, 542 F. Supp. at 1180.

71 *Teleprompter Corp.* v. *Columbia Broadcasting System*, 415 U.S. 394, 406 n.11 (1974). The fact that *amici*'s programs are broadcast over the public airwaves does not, contrary to Sony's claims, constitute an abandonment of rights or create a license to copy. *Roy Export*, 672 F.2d at 1104; *Encyclopaedia Britannica*, 542 F. Supp. at 1180.

new Act, Congress has required cable television to pay royalties when it uses copyrighted material (Section 111). And in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 50 U.S.L.W. 4988 (U.S. June 30, 1982), this Court recently held that increasing the public's access to television programs transmitted via cable does not justify "taking" an apartment owner's "property" by installing wires on his premises without fair compensation, even though the cables occupied only a small and unusable space under a roof parapet. If that *de minimis* empty space merited protection, so does *amici*'s intellectual property.

E. Sony's Effort To Analogize VTRs to Cable Is Specious

Sony and its *amici* place heavy reliance on *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp.* v. *Columbia Broadcasting System*, 415 U.S. 394 (1974). But those cases, which did not involve fair use, are wholly inapposite. The issue there was one of statutory interpretation—whether the term "performance" in the 1909 Act covered retransmission of TV signals by cable, a medium not contemplated when the 1909 Act was passed. Here there is no statutory ambiguity. Betamax admittedly makes "reproductions" under the 1976 Act, and Congress was fully aware of VTR technology.

There is no basis for Sony and its *amici*'s tortured efforts to analogize VTRs and cable television for copyright purposes. *First*, Congress debated cable's status under the copyright laws for ten years; it did not hold a single hearing on VTRs. *Second*, cable pays statutory royalties; Sony wants a free ride. *Third*, cable makes ephemeral transmissions; VTRs make tangible (and often permanent) copies. *Fourth*, the 1976 Act includes cable in its list of exemptions (subject to a compulsory license—Section 111); there is no exemption for VTRs. *Fifth*, cable may not delete commercials because of "harm" to copyright owners;[72] VTRs generally do delete commercials. If cable incurs copyright liability for ephemeral transmissions of TV signals with commercials intact, Betamax should incur

72 House Report 89-90; Section 111(c), (e).

liability for making tangible (and often permanent) copies with the commercials obliterated.[73]

II.

SONY IS LIABLE AS A CONTRIBUTORY COPYRIGHT INFRINGER.

Sony correctly states the law when it says (Pet. 24): "One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."[74] That is *exactly* what Sony does. It manufactures, advertises and sells the Betamax machines and tapes for "the primary purpose of reproducing television programs" (Pet. App. 25-26).

Sony's main defense is that Betamax is a "staple item of commerce" like a typewriter or fountain pen because "the amount of programming available for unchallenged home recording far exceeds that which is challenged" (Br. 4; *see also id.* at 29, 40). Sony says this is the "most crucial" and "most

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73 Sony's *amici* (*e.g.*, *Brief of Amici Curiae* Toshiba Corp., *et al.* at 11) cite *Teleprompter's* statement that cable will expand the audience for television programs and that therefore broadcasters should be willing to pay copyright owners higher fees as the marketplace adjusts to the new technology (415 U.S. at 412-13). But cable carries the advertiser's messages (Section 111). VTRs typically erase commercials. Advertisers will pay less, not more, because VTRs obliterate their messages. As Sony previously recognized (Pet. 4), advertisers "pay to have their commercials interspersed and broadcast with their programming."

Sony's hedged claim (Br. 13, 31) that Nielsen and other audience surveys *could* count VTR usage is nonsensical. If the size of the audience could be counted, the deletion of commercials could not. Moreover, while meters used for audience measurement can determine when a set is tuned to a particular program, they cannot tell when or whether a tape is ever played back. The *amicus* brief of Sony's advertising agency, McCann-Erickson, does not disagree.

74 Quoted from *Gershwin Publishing Corp.* v. *Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). *See also Kalem Co.* v. *Harper Brothers*, 222 U.S. 55, 62-63 (1911); *Universal Pictures Co.* v. *Harold Lloyd Corp.*, 162 F.2d 354, 365-66 (9th Cir. 1947); *see generally Screen Gems-Columbia Music, Inc.* v. *Metlis & Lebow Corp.*, 453 F.2d 552, 554 (2d Cir. 1972); *Screen Gems-Columbia Music, Inc.* v. *Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 n.9 (S.D.N.Y. 1966) (Weinfeld, J.).

important" issue in the case (Br. 4, 39). It is nonsense. Sony's advertisements encourage Betamax purchasers to "*record favorite shows*," "*classic movies*," "*movies*," "*films*," "*cartoons*" and "*novels for television*"[75]—all copyrighted material. Sony's own surveys show that 80% of videocopying consists of entertainment programs.[76] Such programs are copyrighted—primarily by *amici* and respondents who produce or distribute most network programs, most syndicated programs, and most programs for the PBS National Program Service. Sony's claim that taping of *popular* copyrighted programs is a *minor* feature of Betamax is absurd.[77] Consumers obviously buy Betamax to

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75 Pet. App. 41-42; PX 454, 460, 461, 463, 466, 519, 546 (pp. 2-3), 548, 554 (p. 8); R.T. 692.

76 DX OT, Tables 20 and 40.

77 Sony suggests (Br. 7-8) that viewers are especially interested in taping religious, education and sports programs. But Sony's own survey shows that less than 9% of taping time is devoted to such programming (DX OT, Table 20). Moreover, even as to such programs, most of the parties which Sony claims consented to taping (Br. 7) do not even own the copyrights in those programs. For example, the religious and educational broadcasters referred to by Sony (Br. 7) do not own the copyrights in most of the programs they telecast. *Cf. Encyclopaedia Britannica*, 542 F.Supp. at 1158, 1164 (plaintiffs, not educational television station, owned copyrights of programs taped off-the-air). And the baseball, football and other professional teams, not the league officials cited by Sony (Br. 7), own the games and place warnings against making copies during each telecast.

As for Sony's claims about Betamax copying of local-live taped shows that are erased (Br. 9), Sony's survey does not even report the *de minimis* amount of taping of such materials. Local stations, in fact, produce less than 15% of their own programs, with almost one-half being news. Federal Communications Commission, Annual Programming Report for Commercial Television Stations 1973-79. There is little incentive to tape the local news, which grows stale overnight. Except for news, there is virtually no local programming in the evening—the hours of heaviest taping according to Sony's survey (DX OT, Tables 14, 15).

Finally, while Sony claims (Br. 8) that NBC may not object to VTRs because its parent (RCA) manufactures them, NBC could not consent to videocopying of most popular programs on its network because it does not produce or own the copyrights in, more than a tiny fraction of its prime-time schedule. NBC can produce only 2-1/2 hours of prime-time programs under its antitrust consent decree. *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127, 1131 (C.D. Cal. 1978). This season, NBC produces only two

copy their favorite programs, not unpopular material.[78]

Sony also claims (Br. 3 n.4, 12, 43) that it cannot be a contributory infringer because it did not know that Betamax buyers would tape off-air; that it never encouraged them to do so or told them it was legal; and that Sony itself did not know it was illegal. These are specious claims. Betamax was made to copy off-air and, as noted above, Sony's advertisements urged the public to "build a library" and to "record favorite shows" and "classic movies" (Pet. App. 41-42). The claim that Sony did not realize that copying was an infringement is factually incorrect and legally irrelevant. For a decade, from the mid-1960s until the mid-1970s, Sony was advised as to potential copyright liability and put prominent warnings on its VTRs, such as: "THIS VIDEOTAPE RECORDER IS NOT TO BE USED TO RECORD COPYRIGHTED WORKS." (Pet. App. 42, 94.) But, in 1975, with the introduction of its new consumer-oriented and less expensive Betamax model, Sony took the warnings off its machines and out of its advertising and agreed to indemnify its advertising agency for liability arising from its advertising campaign for the Betamax model (Pet. App. 41-42, 94).[79]

The fact that Betamax purchasers rather than Sony perform the final act of copying does not immunize Sony. For example, in *Kalem Co.* v. *Harper Brothers*, 222 U.S. 55 (1911)—the principal copyright precedent cited by Sony (Br. 42)—the

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hours. The other prime-time programs NBC broadcasts contain copyright notices of *amici* and respondents.

78 As Professor Nimmer notes: "It is true that a very small percentage of the works broadcast on television, such as some old silent movies, are no longer in copyright, but this hardly represents a source for 'substantial' non-infringing use of videotape recorders." 3 *Nimmer On Copyright* § 12.04[A] at 12-41.

79 In any case, a contributory infringer is liable if he knew of the anticipated activity ("build a library," copy your "favorite show" or "classic movies"), whether or not he knew it was illegal. *See* 3 *Nimmer On Copyright* § 12.04[A] at 12-34, 12-40 to -41; *Famous Music Corp.* v. *Bay State Harness Horse Racing*, 554 F.2d 1213, 1215 (1st Cir. 1977); *Chess Music, Inc.* v. *Sipe*, 442 F. Supp. 1184, 1185 (D. Minn. 1977).

defendant Kalem had made an unauthorized motion picture of the plaintiff's copyrighted book *Ben Hur* and advertised the film for ultimate theatrical exhibition by third parties. Kalem was held to have infringed the plaintiff's exclusive right of performance, even though the film had actually been exhibited by independent theatres—*i.e.*, Kalem, like Sony, had not committed the final act of infringement. Justice Holmes wrote for a unanimous court:

> The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made. If the defendant did not contribute to the infringement it is impossible to do so except by taking part in the final act. It is liable on principles recognized in every part of the law. (222 U.S. at 62-63.)

Betamax's most conspicuous use—its main selling point in Sony's advertisements—is to copy the favorite copyrighted feature films and other programs on television.

III.

THE QUESTION OF RELIEF IS NOT RIPE FOR REVIEW. IN ANY EVENT, REQUIRING SONY TO PAY A REASONABLE AND CONTINUING ROYALTY WOULD BE A PROPER AND PRACTICAL REMEDY.

Sony asks this Court to render an advisory opinion as to whether the district court would have the power to order Sony to pay a reasonable and continuing royalty—a possible remedy mentioned by the Ninth Circuit (Pet. App. 28-29). That question is not ripe for review because the district court has not yet fashioned relief.

In any event, the courts have broad powers to devise equitable and pragmatic remedies when dealing with copyrights and new technologies—including, for example, withholding the

usual injunction if Sony pays reasonable royalties.[80] As Sony's *amicus* Matsushita concedes, a finding of direct infringement against VTR owners without a remedy against VTR manufacturers would be "an academic curiosity" because it would create "an uncontrollable situation from an enforcement viewpoint."[81] Sony opposes the remedy of imposing royalties *because* it is a pragmatic solution since copyright proprietors cannot, and do not wish to, monitor millions of viewers in this age of easy home duplication. Sony—which originally offered to pay royalties on blank tapes[82]—now claims there is no remedy for the wrong.

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80 *See* 3 *Nimmer On Copyright* § 13.05[E] at 13-91 to -92, § 13.05[F] at 13-101 to -02 and § 14.06[B] at 14-54 and sources cited therein.

81 Brief of General Electric Co., Matsushita Electric Corp., *et al.* as *Amici Curiae* at 6-7. Professor Nimmer states that the "combination of contributory liability" and a continuing royalty would afford copyright proprietors an enforceable remedy (because infringement actions against each VTR owner "would be monumentally unenforceable and . . . pose unacceptable privacy problems") and would also "remove the threat that the machines themselves would be banned." 3 *Nimmer On Copyright* § 13.05(F) at 13-101 to -02 (footnotes omitted).

82 *Schein of Sony Says Tax on Blank Cassettes May Be Answer For Copyright Holders, supra,* at 1.

CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's opinion.

Respectfully submitted,

STUART ROBINOWITZ
(Counsel of Record)
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
(A partnership including
professional corporations)
345 Park Avenue
New York, New York 10154
(212) 644-8000

Attorneys for Amici Curiae,
Creators and Distributors of Programs

Of Counsel:

STEPHEN D. D. HAMILTON
ANDREW J. PECK

Dated: October 27, 1982

APPENDIX A

LIST OF AMICI WITH EXAMPLES OF TELEVISION PROGRAMS AND MOTION PICTURES

I—The following *amici* are involved in the creation, production and/or distribution of children's programming, opera, ballet, dramas and other programs for public television:

Children's Television Workshop (*Sesame Street, The Electric Company, 3-2-1 Contact, The Lion, The Witch and the Wardrobe, Beauty and the Beast, Out to Lunch*)

WGBH-Boston (provides approximately 30% of PBS regular prime-time schedule; programs it supplies include *Masterpiece Theatre, Nova, Enterprise, Evening at Pops, The Victory Garden, World, This Old House, The Last Chance Garage, Julia Child*)

WQED-Pittsburgh (provides approximately 100 hours of programming to PBS per year, including the *National Geographic Series, Kennedy Center Tonight, Freedom to Speak with William Buckley* (next season), *Once Upon A Classic, The Hunter and Hunted*)

WTTW-Chicago (*Soundstage, Sneak Previews, John Callaway's Interviews, The Paper Chase, The Frugal Gourmet, The Merry Widow, Summer and Smoke*)

WTVS-Detroit (*PBS Latenight, Pavarotti Christmas Special, Chrysler—Once Upon A Time And Now, The Wilmar Eight*)

KCTV-Minneapolis/St. Paul (*The Vikings, Tonight's Scandinavia with the Minneasota Orchestra, One Man on His Mountain, Garden Song*)

KCET - Los Angeles (*Cosmos, Why In The World, Hollywood Theatre, Visions, Sound Festival, Giulini Concerts*)

British Broadcasting Corporation (*Alistair Cooke's America, Tinker Tailor Soldier Spy, The Flight of the*

Condor, The Magic of Dance, To Serve Them All My Days, The Forsyte Saga, Civilisation, The Pallisers, I, Claudius, The First Churchills, Jane Eyre, The Tales of Hoffman, Moll Flanders, Pickwick, Elizabeth R)

The Metropolitan Opera (*Otello, La Boheme, Tosca, Der Rosenkavalier, Madama Butterfly, La Traviatia, Cavalleria Rusticana, I Pagliacci, Elektra, The Bartered Bride, L'Elisir d'Amore*)

Beverly Sills (*Barber of Seville, Manon Lescaut, The Turk in Italy, Beverly! Farewell Performance, The Merry Widow, The Daughter of the Regiment*)

Lincoln Center for the Performing Arts (the *Live from Lincoln Center Series,* many *Great Performances* including *Recital at Avery Fisher Hall - Dame Joan Sutherland, Marilyn Horne and Luciano Pavarotti, An Evening With Itzhak Perlman and the New York Philharmonic, New York City Opera Lucia di Lammermoor, Two Philharmonics: Israel and New York - Zubin Mehta Conducts, James Galway Plays Mostly Mozart*)

New York City Ballet (*Dance In America: Choreography of Balanchine Parts 1-4, L'Enfant et Les Sortileges, Bournonville Dances, Genius Celebrates A Birthday; Live From Lincoln Center: Cappelia*)

The Foundation for the Joffrey Ballet, Inc. (*Conversations on the Dance, Tribute to Nijinsky, The Green Table*)

Thames Television International (*Rumpole of the Bailey, Edward and Mrs. Simpson, Flame Trees of Thika, The Naked Civil Servant*)

London Weekend Television International (*Upstairs, Downstairs, Lillie, Love for Lydia, Between the Wars, Seven Dials Mystery, Why Didn't They Ask Evans?*)

Lionheart Distributors (syndicates programs appearing on PBS, including *Alistair Cooke's America, Search for the Nile, Civilisation, War and Peace, The Ascent of Man,*

The Duchess of Duke Street, Madame Bovary, Ireland: A Television History)

Derek Grainger (producer of *Brideshead Revisited*)

Alvin H. Perlmutter, Inc. (*All Things Considered On Main Street, The Dresden Exhibition*)

II—The following *amici* create documentary programs for public or commercial television:

Peter Davis (*Middletown, U.S.A., Hearts and Minds, Selling of The Pentagon*)

Professor Richard Leacock (MIT, Chairman Film/Video Section) (*Community of Praise, Isabella Stuart Gardner, Stravinsky*)

Maysles Films, Inc. (*Grey Gardens, Gimme Shelter, Salesman, Running Fence*)

Donn Pennebaker (*Energy War, Don't Look Back, Monterey Pop, Stravinsky, Keep on Rocking*)

John Scagliotti (*Before Stonewall, Stuff of Dreams*)

Fred Wiseman (*High School, Primate, Hospital, Welfare, Law and Order, Juvenile Court, Model, Seraphita's Diary, Basic Training, Essene, Meat*)

David Wolper (*Roots, Sandburg's Lincoln, The American Heritage Series, National Geographic Society Specials, The Smithsonian Institution Specials, The Rise and Fall of the Third Reich, The March of Time, The Making of the President 1960 and 1964, The Undersea World of Jacques Cousteau, Victory at Entebbe*)

III—The following *amici* are involved in the creation, production and/or distribution of theatrical motion pictures and/or programming made for primary exhibition on television:

Andrews & Associates (syndicator of programs, including *Alligator, Psychic, Have Gun, Will Travel, The Millionaire*)

Robert Benton (director of *Kramer vs. Kramer, The Late Show, Still of the Night*)

Stephen J. Cannell Productions (*The Greatest American Hero, The Quest, The A Team*)

Carson Productions (*The Tonight Show, Teachers Only, A Second Commercial Special*)

Joseph Cates Company (*Hallmark Hall of Fame, Bell System Family Theatre, George Gershwin Special, Anne Bancroft Special, Johnny Cash Special, The Magic of David Copperfield*)

Columbia Pictures Industries, Inc. (*Annie, Tess, The Competition, Das Boot, Tempest, Born Free, The Bridge Over the River Kwai, Kramer vs. Kramer, Lawrence of Arabia, A Man For All Seasons, Hart to Hart, Ripley's Believe It Or Not, T.J. Hooker, Bring 'Em Back Alive, Filthy Rich, Barney Miller*)

Embassy Television (*The Jeffersons, One Day At A Time, Square Pegs, Facts of Life, Silver Spoons*)

Embassy Pictures (*The Graduate, The Lion in Winter, Time Bandits, Vice Squad, Paradise, The Long Good Friday*)

EMI Television Programs, Inc. (*A Piano for Mrs. Cimino, The Manions of America*)

Carl Foreman (producer and writer, *The Guns of Navarone, High Noon, Young Winston*; producer, *Born Free, Living Free*; writer, *The Bridge Over the River Kwai*)

Lillian Gallo (*Surprise, Surprise, Fun and Games, Hustling, Haunts of the Very Rich, The Stranger Who Looks Like Me*)

David Gerber Productions, Inc. (*Police Story, Police Woman, Today's FBI, Beulah Land, Seven Brides for Seven Brothers, The Lindbergh Kidnapping Case*)

Ulu Grosbard (director of *True Confessions, Straight Time, Who Is Harry Kellerman, The Subject Was Roses*)

Hill-Mandelker Films (*Tucker's Witch*)

The Ladd Company (*Chariots of Fire, Blade Runner, Night Shift, Love Child*)

Alan Landsburg Productions (*Gimme a Break, That's Incredible, The Chisholms, In Search of Ancient Mysteries*)

Lorimar Productions, Inc. (*Dallas, The Waltons, Falcon Crest, Knots Landing, A Man Called Intrepid*)

Lucasfilm, Ltd. (*Star Wars, The Empire Strikes Back*)

MTM Productions (*Hill Street Blues, Lou Grant Show, Mary Tyler Moore Show, Rhoda, White Shadow, WKRP in Cincinnati, Newhart, Remington Steele, St. Elsewhere*)

Metro-Goldwyn-Mayer Film Co. (*The Wizard of Oz, Gone With the Wind, Doctor Zhivago, How the West Was Won, 2001: A Space Odyssey, Seven Brides for Seven Brothers, CHiPs, Fame, Gavilan*)

New Yorker Films (distributes films theatrically: *Chan Is Missing, My Dinner With Andre, Aguirre, The Wrath of God, The American Friend, The Chant of Jimmie Blacksmith, Don Giovanni, The Marriage of Maria Braun, The Tree of Wooden Clogs*; and on PBS: *Gates of Heaven, Vernon, Florida*)

Paramount Pictures Corporation (*Raiders of the Lost Ark, Ordinary People, Ragtime, Reds, Atlantic City, Gallipoli, Elephant Man, An Officer and a Gentleman, Becket, Bang the Drum Slowly, Catch-22, The Godfather, Taxi, Happy Days, Star Trek, The Odd Couple, Laverne and Shirley, Mork and Mindy, Joanie Loves Chachi, Star of the Family, Cheers, Family Ties, Powers of Matthew Star, Shogun, A Woman Called Golda*)

Martin Ritt (producer and director, *Norma Rae, Hud*; director, *Sounder, No Down Payment*)

Rollins-Joffe-Mora-Brezner (*Woody Allen films* and *Arthur*)

Romper Room Enterprises, Inc. T/A Klaster Television Productions (*Romper Room*)

Charles Schneer (*Clash of the Titans, Sinbad and the Eye of the Tiger, Golden Voyage of Sinbad, Mysterious Island, First Men In the Moon*)

Bert Schneider (*Easy Rider, Five Easy Pieces, The Last Picture Show, Days of Heaven, Hearts and Minds, The Monkees*)

SFM Entertainment, a division of SFM Media Corp. (*Shock Trauma, The Adventures of Nicholas Nickelby, The Children's Story, Moshe Dayan*)

Aaron Spelling Productions, Inc. (*The Love Boat, Dynasty, Matt Houston, Strike Force*)

Survival Anglia Ltd (*World of Survival, Tales of the Unexpected*)

D.L. Taffner/Ltd. (*Three's Company, Too Close For Comfort, Benny Hill, World at War, Destination America*)

Tandem Productions (*All in the Family, Diff'rent Strokes, Archie Bunker's Place, Maude*)

Telepictures Enterprises, Inc. (syndicates *Here's Lucy, My Favorite Martian, The New Dick Van Dyke Show, People's Court, Real People, Monty Python at the Hollywood Bowl, The Hideaways, The Children's Story*)

Tomorrow Entertainment, Inc. (*Lifeline, Body Human Series, Roll of Thunder, Hear My Cry, Gnomes, Faeries*)

Twentieth Century-Fox Film Corporation (*Star Wars, The Empire Strikes Back, Julia, 9 to 5, The Turning Point, All That Jazz, Breaking Away, Diary of Anne Frank, The French Connection, Patton, Norma Rae, The Sound of Music, Sounder, The Paper Chase,* M*A*S*H, *The Fall Guy, Trapper John, M.D.*)

United Artists Corporation (*Raging Bull, Being There, The Black Stallion, Exodus, One Flew Over the Cuckoo's Nest, The Greatest Story Ever Told, Romeo and Juliet, 12 Angry Men, Rocky I, II, III, Woody Allen films, Pink Panther series, James Bond series, Seven Brides for Seven Brothers, CHiPs, Fame, Gavilan*)

Viacom International, Inc. (producer of network programs, such as *The Devlin Connection, Nurse, Missiles of October, East of Eden*; syndicator of television programs, including *All In the Family, Hogan's Heroes, Cannon, I Love Lucy, Twilight Zone, Hawaii Five-O, Bob Newhart, Honeymooners, Perry Mason, Dick Van Dyke Show, Gunsmoke, The Autobiography of Miss Jane Pittman*)

Victory Television (syndicator of programs, including *WKRP in Cincinnati, Rhoda, The Streets of San Francisco*)

Brent Walker, Ltd. (*Complete Gilbert and Sullivan operas*)

Warner Bros. Inc. (*Life on Earth* (PBS), *Shoulder* to *Shoulder* (PBS), *Superman, The World According to Garp, My Fair Lady, Camelot, The Candidate, The Exorcist, Roots, Scruples, The Thorn Birds, Dukes of Hazzard, Alice, Private Benjamin, Love, Sidney*)

Daniel Wilson Productions, Inc. (*The Late Great Me, Sophisticated Chance, The Great Wallendas*)

Witt-Thomas-Harris Productions (*Benson, Soap, It Takes Two*); Witt-Thomas (*Making a Living*)

IV-The following *amici* are engaged in non-theatrical distribution of motion pictures and television programs:

Direct Cinema, Ltd. (*The Making of Raiders of the Lost Ark, The Making of Rocky III, The Brooklyn Bridge*)

Films, Inc. (the largest non-theatrical distributor in the U.S. with rights to more than 8000 titles, including BBC

films and features such as *Star Wars*, *Reds*, *Arthur*, *Raiders of the Lost Ark*, *9 to 5*, *Ragtime*)

Janus Films, Inc. (*The Seventh Seal*, *Wild Strawberries*, *Jules and Jim*, *Topper*, *Number Seventeen*, *Murder*, *The Most Dangerous Game*, *Pygmalion*, *The Third Man*, *The Lady Vanishes*, *The 39 Steps*, *Oliver Twist*, *Hamlet*, *A Night to Remember*, *Secret Agent*)

Learning Corporation of America (Educational and other films, including *The Autobiography of Miss Jane Pittman*, *Blithe Spirit*, *Brian's Song*, *Brief Encounter*, *The Browning Version*, *A Doll's House*, *Foreign Correspondent*, *Great Expectations*, *Henry V*, *The Hound of the Baskervilles*, *Holocaust*, *In Which We Serve*, *The Ladykillers*, *Last Holiday*, *The Lavender Hill Mob*, *Major Barbara*, *The Man in the White Suit*, *Odd Man Out*, *Rain*, *The Red Shoes*, *Stagecoach*, *To Be or Not To Be*, *Tunes of Glory*)

V-Other *amici*:

International Creative Management, Inc. (one of the world's largest talent and literary agencies representing more than 2400 creators and performers)

Burton Lane (composer and lyricist, *On A Clear Day You Can See Forever*, *Finian's Rainbow*, *Royal Wedding*)

Harold Rome (composer and lyricist, *Fanny*, *Pins and Needles*, *Destry Rides Again*, *Wish You Were Here*)

APPENDIX B

1982-83 SEASON—Prime-Time Programs on CBS, ABC and NBC Produced or Distributed by Amici and Respondents

(Total: 132 Half-Hrs.)

Producer/Distributor	*# Half Hrs.*	*% Total*
Movies	24	18.0
TV Series		
Universal	12	9.0
Columbia	11	8.3
Paramount	10	7.6
MGM	8	6.0
Embassy	8	6.0
MTM	7	5.3
Fox	6	4.5
Spelling	6	4.5
Lorimar	6	4.5
Warner Bros.	5	3.8
Cannell	4	3.0
Landsburg	3	2.3
Hill/Mandelker	2	1.5
Witt/Thomas/Harris	2	1.5
Disney	2	1.5
Viacom	2	1.5
Taffner	2	1.5
Totals:	120	90.6%

APPENDIX C

Top 20 Syndicated Programs
(based on number of markets)

		Distributor	*Amici or Respondent*
1)	M*A*S*H	Twentieth Century-Fox	Yes
2)	Happy Days	Paramount	Yes
3)	Little House on the Prairie	Worldvision	No
4)	Barney Miller	Columbia Pictures Television	Yes
5)	Three's Company	D.L. Taffner	Yes
6)	Saturday Night Live ...	Filmways	No
7)	Hardy Boys/Nancy Drew	MCA	Yes
8)	Sanford & Son	Embassy	Yes
9)	All in the Family	Viacom	Yes
10)	Laverne & Shirley	Paramount	Yes
11)	Mary Tyler Moore	Viacom	Yes
12)	Rockford Files	MCA	Yes
13)	Andy Griffith	Viacom	Yes
14)	The Waltons	Warner Bros.	Yes
15)	CHiPs	MGM/UA	Yes
16)	Eight Is Enough	Lorimar	Yes
17)	The Jeffersons	Embassy	Yes
18)	The Brady Bunch	Paramount	Yes
19)	Star Trek	Paramount	Yes
20)	Hogan's Heroes	Viacom	Yes

Amici and respondents—18 of 20

Amicus Brief

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In The
Supreme Court of the United States
October Term, 1982

SONY CORPORATION OF AMERICA, et al.,
Petitioners,
v.
UNIVERSAL CITY STUDIOS, INC.
and WALT DISNEY PRODUCTIONS,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF EDUCATORS AD HOC COMMITTEE ON COPYRIGHT LAW

Michael H. Cardozo
Counsel of Record

1001 Connecticut Ave, N.W.
Washington, D. C. 20036
(202) 872-1401

August W. Steinhilber
Gwendolyn H. Gregory
Co-Counsel

National Schools Boards Association
1055 Thomas Jefferson St., N.W.
Suite 600
Washington, D. C. 20007
(202) 337-7666

Attorneys for Amicus Curiae
Educators Ad Hoc Committee
on Copyright Law

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BRIEF AMICUS CURIAE OF EDUCATORS
AD HOC COMMITTEE ON COPYRIGHT LAW

INTEREST OF AMICUS

The Educators Ad Hoc Committee on Copyright Law (Ad Hoc Committee), pursuant to Rule 36 of the Rules of this Court, files this brief amicus curiae, having received consent in writing from all parties. A copy of the consent has been lodged with the clerk of the Court.

The interest of the Ad Hoc Committee arises out of the following circumstances.

The Educators Ad Hoc Committee on Copyright Law was first organized when Congress started to hold hearings on a general revision of the copyright law about twenty years ago. The Committee consists of nonprofit organizations representing virtually every school, college and library, public and private, and from kindergarten through graduate education, throughout the country. The names of the current participants in the Committee are listed in the

appendix. The purpose of the Committee was to communicate to Congress the effect on education and scholarship of various proposals for amending the copyright law. The educators', scholars' and librarians' points of view were regularly communicated to the Congressional committees as the bills progressed through the legislative process.

One of the principal concerns of the Ad Hoc Committee was the preservation of the limited right of educators and scholars to make copies of any material that they needed for their teaching and research, without the hindrance of locating copyright owners and demands for excessive royalties. The constituency of the Ad Hoc Committee was satisfied to continue to operate under the authority of the fair use doctrine as the courts had been interpreting it. The Committee, therefore, was pleased that Congress expressly stated that, in writing fair use into § 107 of the Copyright Act, the intention was "not to

change, narrow or enlarge it in any way." The relevant portion of § 107 reads:

> Notwithstanding the provisions of § 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright (emphasis added).

Since the new act was passed, the representatives of copyright proprietors, in the publishing, music and audio-visual fields, have persistently sought to restrict the effect of the fair use provision. The Ad Hoc Committee and educational, library and scholarly groups have been constrained to maintain constant vigilance lest those efforts succeed in frustrating the intent of Congress and the needs of teaching and scholarship. The present case is potentially an example of those efforts.

It should also be noted that, pursuant to request of Congressman Robert W. Kastenmeier, Chairman of the

Subcommittee on Courts, Civil Liberties and Administration of Justice of the House Judiciary Committee, members of the Ad Hoc Committee and other educators joined with representatives of publishers, authors, television networks and other copyright owners to adopt "Guidelines for Off-Air Taping of Copyrighted Works for Educational Use." These Guidelines, formulated after two years of negotiation to reach a compromise on the wide variety of competing interests represented by the negotiators, were read into the Congressional Record by Congressman Kastenmeier on October 14, 1981. 127 Cong. Rec. E4751.

The decision of the Court of Appeals for the Ninth Circuit, decided on October 19, 1981, and reported at 659 F.2d 963, was that off-the-air taping of copyrighted television programs for home use is an infringement of copyright, and that appropriate remedies may be applied. The defendants in this case, however, do not themselves do the copying that

the complainants desire to preclude. Rather, they are the makers and distributors of equipment that produces the copies. The Court of Appeals' opinion states that, on remand, the district court "should reconsider" its determination "that an injunction against sale and distribution of equipment for off-air copying in the home would not be an appropriate remedy." 659 F.2d at 976. That proposition could cause extreme damage to the interests of the educators and librarians.

School teachers and university professors regularly use off-air copying equipment in order to record broadcast programs for display to pupils and students in classrooms. That is expressly allowed as fair use under § 107 of the Copyright Act. Recording for classroom purposes, however, must on occasion be accomplished in homes in the evenings and on weekends when classes are not in session. If the defendants in the present case were enjoined from selling and distributing the necessary equipment, or

were required to pay significant royalties for this fair use privilege granted to educators, the educational use of broadcast material would be seriously handicapped.

The teachers, scholars, and librarians are deeply concerned lest the fair use exception to copyright proprietors' exclusive rights be eroded by measures such as those sought by the plaintiffs in this case and apparently approved by the court below.

REASONS FOR AMICUS POSITION

In holding that home recording and use of taped copies of broadcasts of copyright material are not "fair use" under the Copyright Act and may be enjoined, the court below was not simply interpreting a statute in a dispute among major commercial interests. The outcome of this case, especially as treated in the opinion below, can affect adversely press freedom, education, and the public's right to hear, see and know. Those rights are expressly within the purposes described in that part of the

Constitution that forms the constitutional basis of the Copyright Act: "To promote the progress of science and useful arts ..." United States Const., article I. § 8, cl. 8. The fair use exception, as judicially created and confirmed in the Act at 17 U.S.C. § 107. is a reconciliation of free speech protection of the First Amendment with the copyright protection authorized by that introductory phrase of clause 8 "... [T]he doctrine of fair use ... has been precisely contoured by the courts to assure simultaneously the public's access to knowledge of general import and the right of an author to protection of his intellectual creation." H.C. Wainwright & Co. v. Wall St. Transcript Corp., 418 F. Supp. 620, 624 (S.D.N.Y. 1976). See also Keep Thompson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (D. New Hampshire 1978); 1 Nimmer on Copyright, § 1.10[D] at 1-91 (1981). Without a right of fair use that prevents the Copyright Act from interfering with, "the progress of science and the useful arts," there would have been a serious clash

with the Constitutional clause that specifies the promotion of progress. The command of the Constitution "to promote the progress of science," has been the motivating force, usually unspoken, behind the judically created right. Students of the history of the subject have regularly alluded to this as the source of the doctrine. See the many citations in Mary S. Lawrence, "Fair Use: Evidence of Change in a Traditional Doctrine", in Copyright Law Symposium, Number Twenty-seven, American Society of Composers, Authors and Publishers, New York, 1982, pp. 71-79. When Congress wrote § 107 into the 1978 revision, without intending to change, narrow or enlarge "fair use" in any way, it was doing no more than codifying the judges' reconciliation of the restrictive protection of the statute with the liberal Constitutional aspiration.

Unlike the users of copyrighted material specifically addressed by the complaint in this case, the constituency represented by the Amicus Ad Hoc Committee, consisting of professors, teachers and

librarians, does not make copies of broadcasts "for home use." Their concern is with copying for teaching, including classroom use, which is specifically defined as "fair use" in § 107. The availability of copying equipment, such as that made and sold by the defendants in this case, is essential for that purpose.

The opinion below, however, stated that the "district court ... should reconsider its action" in determining "that an injunction would not be an appropriate remedy." 659 F.2d at 976. The court concluded that "the result of applying fair use to intrinsic use cases ... is a fundamental restructuring of the copyright system not justified by the statutory scheme or traditional notions of fair use." 659 F.2d at 971. The opinion errs in this description of the fair use rule, as indicated in the following parts of this brief. Even if the opinion below should be held to state the law correctly as to home use, however, the suggestion of

an undiscriminating injunction against sale and distribution of the Betamax and similar recording devices is wholly improper.

I. AN INJUNCTION AGAINST SALE WOULD PREVENT ALL FAIR USE OF OFF-AIR RECORDINGS

The injunction sought by the plaintiffs and sanctioned by the Court below would deprive educators at all levels of the opportunity to record material needed for effective teaching. As previously set forth in the statement of interest of amicus curiae, teachers regularly use off-air copying equipment in order to record broadcast programs for display to pupils and students in classrooms. That is expressly allowed as fair use under § 107 of the Copyright Act. Recording for classroom purposes, however, must on occasion be accomplished in homes in the evening and on weekends when classes are not in session. If the defendants in the present case were enjoined from selling and distributing the necessary equipment, or were required to pay significant royalties for this fair use privilege granted to educators, the educational use of broadcast material would be seriously handicapped.

The Court is fully aware of the number of pupils and students in schools and colleges throughout the country. The educational opportunities of all of them would be affected adversely by denial of access to one of the most important technological developments of recent years. Further, a decision that copying for educational purposes may not be done on videotape recorders could also affect the similar use of other technologies in education, such as photocopying machines, word processors, satellite transmissions and telecopying.

The remedy suggested by the court below would threaten to make all of this kind of activity practically impossible. Whether or not the court correctly interpreted the fair use provisions of the Act as applied to home use, the remedy of preventing other, legitimate uses of the recording equipment is equivalent to throwing out the baby with the bath water. It is far more protective of the interests of copyright proprietors than is necessary or

justified. The need for correction of that part of the decision below on a question of federal law of nationwide importance warrants reversal of the judgement below.

II. RECORDING OFF-AIR FOR EDUCATION IS FAIR USE

In deciding that recording off-the-air for home use is an infringement of copyright, the court below, at 659 F.2d, page 970, indicated approval of the position expressed by Leon Seltzer in his book, Exemptions and Fair Use in Copyright, 24 (1978), that the statutory definition of "fair use" refers to use "by a second author of a first author's work," and does not cover "mere reproduction of a work in order to use it for its intrinsic purpose to make what might be called "ordinary" use of it. The Act, however, states expressly that copying for "teaching (including multiple copies for classroom use)" is fair use. 17 U.S.C.A. § 107. No citation of authority is needed to defend a position so clearly supported by statute. There are, moreover, no cases to the contrary.

Using a broadcast work for teaching is clearly placing it in "ordinary" use for its "intrinsic purpose," that is, to be seen and heard by viewers. When the viewers of the copy are students in a classroom, the use of the copy is, by the express statutory definition, "fair." The nature of the use determines the fairness; there is no infringement if the copy is used as the Act permits. Thus, it is not the act of copying that alone constitutes an actionable infringement. In expressly approving the making of copies for uses that are "fair", the Act establishes a kind of condition subsequent to determine whether a copying is an infringement. After the copy is made and used for a purpose that is "fair", there is no cause of action. By express statutory declaration, a copy that is put to an educational use is fairly used.

III. MANY OTHER FORMS OF COPYING ARE PRIVILEGED

The privilege of copying copyrighted material, whether by home recorder or otherwise, without the

consent of the copyright owner is obviously not limited to the specific circumstances listed in § 107 as "included" under fair use. Court decisions, for example, have denied infringement liability for copying in parody and satire cases (Berlin v. E. C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964)) and in the use of copies for comparative advertising (Triangle Publications, Inc. v. Knight Ridder Newspaper, Inc., 626 F.2d 1171 (5th Cir. 1980)). No specific exemption has been needed for copies to be used extensively in judicial proceedings. See Nimmer, § 13:05 D[2] and Marvin Worth Products v. Superior Films Corp. 319 F. Supp. 1269 (S.D.N.Y. 1970). Even more clearly, classroom use may be made of copies of broadcast material for which no copyright protection is authorized. Works in the public domain, either by expiration of copyright or original ineligibility, have no copyright monopoly. Materials emanating from government sources cannot be the subject of copyright. Copyrighted materials covered by a specific license to copy are often used

in classrooms. Photographs that are "news" may not be withheld from public viewing by a claim of copyright. Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968). In fact, Congress was fully aware that courts have consistently supported the principle that there is no infringement by copies that are used for non-commercial purposes and that cannot be shown to do harm to the copyright owner. Williams & Wilkins Co. v. U.S. 487 F.2d 1345, at 1354, 1359 (Ct. Cl. 1973), aff'd 4-4, 420 U.S. 376 (1975). All of these materials may be copied freely, regardless of the intended use, and without any express statutory exception. They would become inaccessible, however, for classroom teaching if the injunction proposed by the court below were imposed.

The fact that home, non-commercial use of recorded video broadcasts was not expressly defined in the statute as fair use, or otherwise made an exception to the proprietor's exclusive rights, certainly did not indicate that Congress considered that kind of use an infringement. Indeed, the

opposite conclusion is warranted by the assumption of the Congressional Committees, without an express provision in the law, that home copying of audio broadcasts is not an infringement. (See floor statement by Rep. Kastenmeier, 117 Cong. Rec. 34748 (1971)). No need to incorporate an express exception for copying video broadcasts for noncommercial home use was perceived.

IV. CONSTITUTIONAL RIGHTS OF "USERS" ARE ABRIDGED

First Amendment

Often publishers, authors and other copyright owners argue that they have a "constitutional property right" guaranteed by the U.S. Constitution which is superior to any "rights" put forth by the public, by educators or others. However, that is not so. In fact, no "rights" exist at all except as conferred by Congress in order to promote the public interest in the arts and science.

The Constitution provides in Article 1, § 8, cl.8:

> "The Congress shall have Power...to make all Laws which shall be necessary and proper...to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right in their respective Writings and Discoveries...

The framers of our Constitution included this section, not in order to protect individual property interests, but to promote the public interest in securing scientific discoveries and works of art. To the extent that the Copyright Act provides otherwise by attempting to create a complete monopoly, it exceeds the authority of the Congress. 50 Notre Dame Law 790, The Constitutional Dimension of Fair Use in Copyright Law, Harry N. Rosenfeld.

Amicus as a committee of educators, is as interested in promoting the Arts and Sciences as are the Respondents but, unlike Respondents, Amicus does not believe that enjoining or taxing the use of home video recorders is the way to do it. The interest of Arts and Sciences is not promoted if the "rights" given to Authors and Scientists by the Congress are

so complete as to preclude the public from enjoying the work produced.

In the words of the 2d Circuit in Berlin v. E.C. Publications, Inc., 329 F. 2d. 541 (1964)),

> "[C]ourts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."

If one is to pit the expressed First Amendment free speech rights of the public against the implicit rights secured by the Congress pursuant to Constitutional authorization, surely the First Amendment rights are superior. It is the province of Congress to come up with a means to promote the public's interest in the creation of new televised works, while also protecting the First Amendment rights of the public to view the works. Further, the doctrine of "fair use" has developed in the courts, and is included in the Copyright Act, for a two-fold reason: to preserve individual First Amendment rights and to protect the rights of "teachers, researchers

and scholars who, in the bona fide exercise of their profession and without plagiaristic motivation, contribute to the advancement of art, science, and industry." 75 NW U.L. No. 2, April 1980 A Modernized Law Use Code for the Electronic as well as the Gutenberg Age, Sigmund Tumberg.

As the Supreme Court stated in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)

> "But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistent with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.
>
> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which trust truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee."

In comparing the case at bar with the Supreme Court's dilemma in Williams and Wilkins Co., where the court balanced the benefit to medicine against the copyright benefit - the Ninth Circuit opined

that "there is no countervailing societal benefit to 'weigh' against the copyright interests of the author." Universal City Studios v. Sony, 659 F.2d 963, 971 (1981). This statement is surprising in light of the Supreme Court's frequent affirmations that the First Amendment is the essence of self-government and that this amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Associated Press v. U.S., 1, 20 (1944). Any curtailment of the dissemination of information through an injunction or otherwise, would necessarily implicate First Amendment rights. It is incumbant on this court to answer the ultimate question of whether the restrictions placed on First Amendment rights by an injunction against home use of video tape recorders or by royalty or tax on the sale of recorders and tapes - is warranted only by a proven and substantial damage to the public interest in the protection of copyrighted televised works. Amicus submits that

Respondents have shown nothing more than the opinion of certain producers of copyrighted entertainment works that their financial benefit will be lessened to some unknown extent if the Sony Corporation and others are allowed to continue to produce the video recorders for use in the home. At the most, Respondents have shown that a possibility exists that some owners of video recorders may use the video in violation of the Copyright Act, but the economic effect of that use remains undetermined. It could also be argued that some users of photocopy machines, or cameras may use them in violation of the Copyright Act. Should the use of such machines also be enjoined?

"The limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors and that the copyright monopoly is a necessary stimulus to the full realization of such creative activities." Nimmer, 17 UCLA L. Rev. 1180 (1970) Does Copyright

Abridge the First Amendment Guarantees of Free Speech and Press? In a case where the copyright monopoly is sought to be made absolute, which is the case here, there must be clear showing that the public interest is promoted by such an awesome intrusion on the First Amendment rights of the public. No such showing has been made by Respondents. There is no showing that an injuction against use of recorders in the home is the only way to protect the public interest in the creative interests of the copyright holders, and that it is worth the extreme measures of complete suppression of the First Amendment rigths of video recorder owners. Amicus submits it is not.

V. FIFTH AMENDMENT AND ARTICLE I., § 8, cl. 1

Respondents, in their brief in opposition to the granting of the petition for certiorari argued that this court should defer to the Congress which is considering certain bills to resolve the issue at bar. However, several of those bills include a royalty provision which is constitutionally suspect.

Under the royalty provision in these bills, see e.g. S. 1758, 97th Cong. 1st Sess., 127 Cong. Rec. D1253 (1981), a royalty fee would be collected from importers and distributors of video tape recorders and video tapes. These royalty fees would be held by the Copyright Royalty Commission which would devise a mechanism for distributing the funds to the holders of copyrights. This sounds very neat and tidy except for the fact that it constitutes a "taking" of private property for a private use. It will be argued that there is a public use in the promotion of the arts and sciences. However, there is no evidence to show that is what the royalty provision would do.

In the context of education alone, (ignoring the many private uses), video tape recorders are used for a multitude of purposes which requires recording material off-the-air. Just some of the examples in education include:

- o providing an opportunity for students to see or hear themselves and thus improve their skills such as speech therapy classes, choir, music classes, acting classes, football and other sports activities, etc.

- o Recording of teacher lectures for later showing to home-bound students like handicapped children or students who have missed the class, etc.

- o Taping events for later showings in class, e.g., an operation in a hospital, a natural event such as an eclipse.

- o Creating original material for either curricular or extracurricular use, e.g., an original play, a simulated newscast.

- o Providing in-service training and evaluation of teacher performance.

Even where video recorders are used to tape off-the-air, much of the material taped by educators is not copyrighted - for example, presidential press conferences or addresses to Congress, formerly copyrighted material which is now in the public domain, material developed and broadcast by the school district through television stations owned and operated by the school district itself.

As stated, there are many uses to which video tape recorders are put which do not involve copyrighted material <u>at all</u>. There are also many uses of video tape recorders which involve

copyrighted material, but which are fair and do not involve the violation of the Copyright Act and, thus, do not impede the Consititutional purpose to promote the arts and sciences. Respondents must provide a clear showing that video tape recorders are used primarily to tape copyrighted material, in violation of the Copyright Act. In the absence of such a showing there is no showing of a "public" use for which a "taking" might be justified. Thus, any royalty provision is in contravention of the 5th Amendment prohibition against "private property [be]ing taken for public use, without just compensation." Further, the power of the Congress to tax (certainly, a royalty is a tax) is limited by Article I. § 8, cl. 1 to "pay the Debts and provide for the common Defense and general Welfare of the United States". Without the showing that there is a public interest in imposing a tax, royalty, etc., in order to make payments to private copyright holders - the Congress has no power to levy the tax or royalty. Kansas Gas & Electric Co. v. City of Independence, Kansas 79 F.2d 32 (C.C.A. 1935)).

CONCLUSION

A prohibition against any copying of televised broadcasts, an exaction of a royalty on the recording equipment, or an injunction against sale or distribution of the equipment as sought by the plaintiffs and sanctioned by the court below, would be an unwarranted interference with the rights of teachers, school systems and college and university professors under the Act. Even if the court below, while dealing with "home use" of copies, did not intend to impose the same kind of obstacle in the non-profit educational context, the decision below obviously sanctions it and would improperly diminish the "fair use" privilege. This Court is urged to correct that error.

Respectfully submitted,

Michael H. Cardozo, Counsel of Record
Suite 1004 1001 Connecticut Avenue, N.W.
Washington, D. C. 20036
(202) 872-1401

August W. Steinhilber
Gwendolyn H. Gregory
Co-Counsel
National School Boards Association
1055 Thomas Jefferson St., N.W.
Suite 600
Washington, D. C. 20007
(202) 337-7666

Attorneys for Amicus Curiae Educators Ad Hoc Committee on Copyright Law

APPENDIX

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

Agency for Instructional Television

American Association of Law Libraries

American Association of School Administrators

American Association of University Women

American Council on Education

American Educational Theatre Association, Inc.

American Library Association

Association for Childhood Education International

Association for Educational Communications and Technology

Association of American Law Schools

Association of Research Libraries

Corporation for Public Broadcasting

Council for American Private Education

Council for Chief State School Officers

Independent Colleges Office

International Reading Association

Joint Council on Educational Telecommunications, Inc.

Modern Language Association

Music Educators National Conference

National Association of Independent Colleges and Universities

National Association of Schools of Music

National Clearinghouse for Bilingual Education

National Commission on Libraries and Information Science

National Council of Teachers of English

National Education Association

National Public Radio

National School Boards Association

Public Broadcasting Service

Speech Communication Association

Uniformed Services University of the Health Sciences

Amicus Brief

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In The

Supreme Court of the United States

October Term, 1982

SONY CORPORATION OF AMERICA, et al.,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF OF GENERAL ELECTRIC COMPANY, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., N.A.P. CONSUMER ELECTRONICS CORP., PANASONIC HAWAII, INC., RCA CORPORATION, US JVC CORP., AND VICTOR COMPANY OF JAPAN, LTD., AS *AMICI CURIAE*

ALFRED B. ENGELBERG
MORTON AMSTER
JESSE ROTHSTEIN
ANTHONY F. LoCICERO
JOEL E. LUTZKER
AMSTER, ROTHSTEIN & ENGELBERG
Attorneys for Amici Curiae
90 Park Avenue
New York, New York 10016
(212) 697-5995

6619 LUTZ APPELLATE PRINTERS, INC.

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INTEREST OF AMICI[1]

Amici Matsushita Electric Industrial Co., Ltd. and Victor Company of Japan, Ltd. manufacture videotape recorders ("VTRs") which are distributed and sold in the United States. Amici General Electric Company (GE brand), Matsushita Electric

1. This Amicus Brief is presented to the Court under Rule 36.2 of the Rules of the Supreme Court and letters of consent from petitioners and respondents are on file with the Clerk of the Court.

Corporation of America (Panasonic and Quasar brands), N.A.P. Consumer Electronics Corp. (Sylvania, Magnavox and Philco brands), Panasonic Hawaii, Inc. (Panasonic brand), RCA Corporation (RCA brand) and US JVC Corp. (JVC brand) each distribute and sell VTRs in the United States. VTRs manufactured, distributed and sold by these Amici play an important role in the expanding U.S. VTR market[2] and compete with the Betamax brand VTRs manufactured by Sony, which are involved in the opinion of the Ninth Circuit in *Universal City Studios v. Sony Corp. of America ("Sony")*, 659 F.2d 963 (9th Cir. 1981), now before this Court for review.

On November 6, 1981, less than three (3) weeks after *Sony*, Universal City Studios, Inc. commenced an action ("*Universal v. RCA et al.*," No. 81-5723 FW, C.D. Cal.)[3] against Amici and virtually all other manufacturers and distributors of VTRs, and their advertising agencies. As in *Sony*, the complaint in *Universal v. RCA et al.*, asserts that the in-home, non-commercial, private, off-the-air video recording of copyrighted works constitutes copyright infringement, for which the manufacturers, distributors and advertisers of VTRs are all allegedly liable. Thus, Universal seeks to extend the erroneous holding of *Sony* to the entire VTR industry.

The questions raised by *Sony* not only have a direct economic impact on the entire VTR industry, but also have far reaching and adverse consequences on all high technology industries and the consuming public which benefits both socially and economically from the development and commercial exploitation of new products. Prior to the Ninth Circuit opinion in *Sony*, the Copyright Law had always been construed so as to simultaneously accommodate the development of new technologies and the need for reasonable compensation to copyright proprietors. The courts have consistently recognized that copyright proprietors have the

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2. Total retail sales of Amici's VTRs and related products in 1981 exceeded an estimated 1.2 billion dollars.

3. The plaintiffs below are Universal City Studios, Inc. and Walt Disney Productions and are referred to herein collectively as "Universal". Disney is not a party to the new action.

ability to adjust their economic relationships to accommodate the growth of new technologies, such as cable television ("CATV") and photocopying, and that regulation of these technologies with respect to emerging copyright issues should be defined and controlled (if at all) by Congress. In contrast, *Sony*, if upheld, would give a copyright proprietor control over the question of whether a new technology should be permitted to exist, or at least the right to define the economic conditions for that existence. Amici, as members of a high technology industry which invests huge sums of money in the development of new products, are significantly affected by the dangerous precedent created by *Sony* which, unless reversed by this Court, could undermine the orderly progress of science and the useful arts.

SUMMARY OF ARGUMENT

The Ninth Circuit opinion effectively holds that viewers must pay to watch free television in the privacy of their own home if such television viewers employ VTRs to time-shift a copyrighted televised program. The decision is based on the erroneous premise that the proprietors of copyrighted motion pictures and other copyrighted televised works should control, rather than adapt to, the means through which the public may gain access to their works. There is nothing in the constitutional philosophy or legislative history of the Copyright Law which supports this premise.

To the extent that the purely personal decision to time-shift a television program in the privacy of one's home may be a literal violation of any exclusive right granted by the Copyright Law, it is due solely to the understandable inability of Congress to anticipate the precise nature and impact of each new technology on such law and to create, in advance, a specific statutory exemption to deal with it. This Court has, therefore, recognized the need to construe the Copyright Law in a manner consistent with its constitutional purpose so as to promote, rather than undermine, the existence or development of new technology capable of increasing public access to copyrighted works.[4]

4. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975); *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U.S. 390 (1960).

Congress, in codifying the fair use exemption to literal infringement (17 U.S.C. §107) and in urging the courts to retain a flexible view of the fair use doctrine in the light of emerging technologies has reinforced the correctness of this Court's approach.

These judicial decisions and legislative actions are consistent with the principle that the Copyright Law was not designed or intended to give copyright proprietors control over the particular means by which the public obtains access to a copyrighted work. Nor was that law intended to control purely private, non-commercial uses of copyrighted works. To the contrary, both the extent of such access and the manner in which the copyright owner is compensated have always been solely a function of the nature of the work and the technology available to disseminate it in an economical manner.

For example, authors of books or other written works must seek their reward in an environment where the market for their books is limited by free public libraries, rental libraries, book swapping and other such alternatives which provide either free or inexpensive access to copyrighted works without additional remuneration to authors. Moreover, any attempt by such authors to control or limit the time or place in which a book is read would offend the most basic concepts on which our free society is based.

In contrast to books, public access to movies or other audiovisual works heretofore has been limited because of the unavailability of technology suitable for individualized delivery systems. Until recently, it simply was not economically feasible to provide individuals with means for controlling the time when an audiovisual work could be enjoyed, and motion picture theatres represented the only practical delivery system for audiovisual works. Free television, later augmented by CATV systems, has increased the public's access to audiovisual works and dramatically changed the potential rewards and bases for payment available to the copyright proprietor. Pay television, pay per view television in which individuals can select and pay for specific programs at selected times, and direct broadcast satellites are among the emerging delivery systems which are being profitably exploited by Universal and other motion picture producers to turn individual homes into private motion pictures theatres. The traditional time, place and manner in which motion pictures are viewed is changing

and will continue to change with further technological developments. VTRs simply provide television viewers with electronic eyes which make it possible for them to have the same control over the time when they enjoy audiovisual works as has always been true for books. Such private use of VTRs by individuals does not interfere with the ability of copyright proprietors to negotiate fair compensation for their copyrighted works before they are made available to television viewers.

The Ninth Circuit reached the conclusion that the private, in-home, time-shifting of television programs is copyright infringement only by taking an inflexible view of both infringement and fair use and by ignoring the fundamental fact that the reward to copyright proprietors flows from, rather than controls, the interplay between public access to copyrighted works and the available technology for delivering those works. In so doing, it disregarded what it acknowledged to be the "elaborate, painstaking and thoughtful opinion"[5] of the *Sony* Trial Court; the proper flexible approach to evaluating infringement and fair use mandated by the prior decisions of this Court and the circuit courts; and Section 107 of the 1976 Copyright Act. As one significant example, the Ninth Circuit treated the economic facts surrounding time-shifting as being legally irrelevant to its fair use analysis even though prior precedent uniformly holds tht economic harm is the central and most important element of a fair use analysis.[6] The Ninth Circuit simply ignored: that copyright proprietors are already being handsomely rewarded by television networks for permitting the broadcast of their works over "free" television; that advertisers pay the networks in the hope of achieving the largest audience for their message; that VTRs expand the audience size thus increasing the potential audience for the advertiser's message; that the increased audience size is measurable and can be taken into account in negotiating compensation prior to broadcast; and that the viewers of television programs, including VTR users, are also the consumers of the products advertised on television and indirectly pay for that advertising through increased prices. The

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5. 659 F. 2d at 964.

6. *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F. 2d 1171 (1980).

viewer-consumer will be required to pay twice for a single viewing of the same program if copyright proprietors are permitted to extract a royalty from the manufacturers of VTRs, as suggested by the Ninth Circuit — once when they purchase a VTR or blank video cassette and a second time when they purchase the products advertised on television.

A wide variety of other economic facts, which have become more apparent as the number of VTR households has expanded, support the wisdom of the *Sony* Trial Court in exempting in-home video recording from the reach of the Copyright Law and demonstrate the error in the Ninth Circuit's reversal of that decision. It is completely disingenuous for Universal to argue that it is being irreparably damaged by the existence of VTRs, while simultaneously inducing and profiting from the purchase of VTRs by making pre-recorded video cassettes of Universal motion pictures available for purchase or rental. Universal could have limited the availability of its software to video disc players which lack any recording feature.

The plain fact is that the profit potential in producing motion pictures has been swelled by pay TV systems, VTRs and a wide arsenal of other new delivery systems without damaging revenues from traditional sources such as theatres and "free" television. If the marketplace is permitted to function in its normal fashion, copyright proprietors of audiovisual works will receive compensation for their works in direct proportion to the anticipated or actual number of viewers in each medium of delivery without impeding the use of any new technology and without the imposition of a bureaucracy for collecting and distributing royalties which would inefficiently attempt to achieve the same result achieved by the operation of the free marketplace.

The Ninth Circuit's opinion with respect to direct copyright infringement by individuals as a result of video recording in the privacy of their homes would be little more than an academic curiosity but for its holding that the manufacturer, distributor, retailers and advertisers of VTRs are liable as contributory infringers. Absent such a holding, private acts committed in an individual's home could not be proved and, in any event, the millions of VTRs in use would create an uncontrollable situation

from an enforcement viewpoint.[7] The fact that private in-home audio recording was common and unrestrained was a primary motivation for congressional recognition that such recording was exempt from the reach of the Copyright Law.[8] It is also among the reasons expressed by this Court in *Aiken* for ruling that the playing of personal radios in public places does not constitute copyright infringement.

The Ninth Circuit erroneously believed that the privacy aspects and other practical barriers to the assertion of Universal's copyright infringement claim heightened the need for both an advisory opinion and the lowering of contributory infringement standards. In effect, it attempted to judicially legislate a solution to the existence of VTRs by first shifting infringement liability to the manufacturer and then ostensibly ameliorating the effect of that shift by strongly suggesting as the most appropriate remedy, a non-statutory, compulsory, continuing royalty rather than a permanent injunction.

However, in concluding that there was no contributory infringement, the *Sony* Trial Court found that VTRs have substantial non-infringing uses including the recording of news, public events, religious and sports programs and a wide variety of other televised material which is uncopyrighted, uncopyrightable, or copied with consent.[9] The Ninth Circuit simply disregarded these purely factual findings and erroneously concluded, without evidentiary support, that "virtually all television programming is copyrighted material"; that VTRs are "sold for the primary purpose of reproducing television programming";[10] and that it should establish a broad precedent

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7. Indeed, Universal has disavowed any intention or desire to impede or prevent direct infringement (*Universal v. RCA*, et al., First Amended Complaint, par. 8) and was able to prove direct infringement in this case only by granting a release in exchange for an admission of individual direct infringement.

8. The Ninth Circuit opinion (659 F. 2d at 967) clearly recognizes the existence of the audio recording exemption.

9. 480 F. Supp. at 468.

10. 659 F. 2d at 975.

based upon those unsupported factual findings, which would economically control, if not eliminate, the use of VTRs. In reaching these conclusions, the Ninth Circuit not only violated the clearly erroneous standard of review but also disregarded the fundamental legal prerequisites to a holding of contributory infringement. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 50 U.S.L.W. 4592 (1982); *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964). This Court has held that manufacturers cannot properly be held liable for the infringing actions of their customers simply because they can anticipate that some customers will use their products to engage in such unauthorized conduct. To establish liability, the manufacturers must be active participants in the infringement, and the law will not presume such participation where, as here, there are substantial non-infringing uses for the product.

With respect to an appropriate remedy, the Ninth Circuit's suggestions range from a permanent injunction against the use or sale of VTRs — relief which has been publicly disavowed by Universal as being unnecessary — to the imposition of compulsory license fees on VTRs — a remedy not provided for as part of the comprehensive list of remedies in the Copyright Act. The Ninth Circuit improperly criticized the *Sony* Trial Court for permitting the complexity of the remedy question to unduly influence its evaluation of liability. It should have recognized that the absence of a suitable remedy was due to the absence of any violation of the basic purpose and intent of the Copyright Law.

ARGUMENT

I.

The Ninth Circuit applied the wrong standard in finding that in-home recording for private use is infringement.

At the heart of the Ninth Circuit's erroneous holding that the in-home recording of copyrighted television broadcasts is copyright infringement, is its stated belief that any reproduction of an entire copyrighted work for its intrinsic, or ordinary, use must always result in a finding of infringement.[11] In the Ninth

11. 659 F. 2d at 970, 971-2.

Circuit's view, there are no technological, economic or other factors which can ever support a finding of non-infringement if an entire copyrighted work is reproduced and used in its ordinary manner. Such a construction of the Copyright Law is simply not supportable as a matter of constitutional policy, statutory language, legislative intent, or judicial precedent.

This Court has stated that the Copyright Law reflects a balance between the desire to encourage and reward creative work and the need to promote the broad public availability of the arts. *Aiken,* 422 U.S. at 156. *American Tobacco v. Werckmeister,* 207 U.S. 284 (1907). To carry out that purpose, the law gives an author control over the sale or commercial use of copies of the copyrighted work. *Goldstein v. California,* 412 U.S. 546, 555 (1973). Nothing in this Court's expressions of copyright policy suggests that a finding of infringement will always flow from the copying of an entire copyrighted work for intrinsic purposes. To the contrary, the foregoing decisions strongly suggest that private, non-commercial uses of a copyrighted work are beyond the reach of the Copyright Law.

Express legislative approval has been given to the copying or use of an entire work for intrinsic purposes in a significant number of instances, including:

> 1. The in-home recording of copyrighted audio broadcasts for private listening purposes. This exception has clearly been recognized by Congress and was even acknowleged by the Ninth Circuit. 659 F. 2d at 967. *See also,* 1971 U.S. Code Cong. and Ad. News, 1566 at 1572.
>
> 2. Any performance which is not public. 17 U.S.C. §106(4). This exception would unquestionably apply to the playback of a copyrighted video tape recording in the privacy of the home.
>
> 3. The library photocopying of single copies of copyrighted printed works. 17 U.S.C. §108(a).[12]

12. This section of the Copyright Act essentially approves and expands upon the admittedly intrinsic copying exception established in *Williams & Wilkins*

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4. The playing of a copyrighted work on an ordinary radio in a public establishment. 17 U.S.C. §110(5).[13]

5. The making of archival copies of copyrighted ephemeral recordings by broadcasters. 17 U.S.C. §112(a).

6. The importation, for private use of the importer, of a single copy of an infringing a work published abroad. 17 U.S.C. §602(a)(2).

These provisions and several others which may be found in 17 U.S.C. §§108-118, mainly involve private, non-commercial uses of an entire copyrighted work for its intrinsic purpose.

In addition to the foregoing provisions, the 1976 Copyright Act codifies the long-standing doctrine of fair use—the broadest and most flexible limitation on claims of copyright infringement. 17 U.S.C. §107. Fair use has been defined as a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner. . . ." *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966). It has also been aptly characterized as a "rule of reason fashioned by judges to balance the author's right to compensattion for his work, on the one hand, against the public's interest in the widest possible dissemination of ideas and information, on the other." Latman, *Fair Use of Copyrighted Works* 5 (Sen. Comm. on Judiciary Study, No. 141960); *Triangle Publications v. Knight-Ridder Newspapers*, 626 F. 2d 1171 (5th Cir. 1980).

In giving legislative approval to the fair use doctrine, Congress made it clear that it did not intend to limit the flexibility of the

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Co. v. United States, 487 F. 2d 1345 (Ct. Cl. 1973), *affirmed by an equally divided Court*, 420 U.S. 376 (1975) — a case which the Ninth Circuit criticizes as bad law even though it has now been legislatively approved.

13. This exception gives legislative approval to this Court's decision in *Aiken*.

doctrine or retard its further development by the courts. Accordingly, both the House and Senate Reports[14] state:

> "The Bill endorses the purpose and general scope of the judicial doctrine of fair use, *but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.* Beyond a very broad statutory explanation of what fair use is and *some of the criteria* applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." (Emphasis added.)

This clear expression of legislative intent, as well as the language of Section 107 itself, are in conflict with the Ninth Circuit's attempt to develop a *per se* rule of infringement with respect to intrinsic copying. There are no *per se* exceptions to the fair use doctrine, and all evidence bearing on fair use must be considered in each case. *Triangle Publications v. Knight-Ridder Newspapers,* 626 F. 2d at 1175. *See also,* 3 *Nimmer on Copyrights,* §13.05(A).[15]

Even Universal City Studios, Inc. has disavowed the Ninth Circuit's *per se* infringement rule. During the same week in which the Ninth Circuit rendered its opinion, a group of educators and motion picture producers, including Universal City Studios, Inc., acting under Congressional auspices, agreed to fair use guidelines for off-the-air recording of copyrighted television broadcasts for educational purposes. 127 Cong. Rec. No. 145, E4751, Daily Ed., October 14, 1981. Those guidelines clearly permit the making of copies of an entire copyrighted work for intrinsic purposes.

In stark contrast to the Ninth Circuit, the *Sony* Trial Court thoroughly evaluated all of the relevant evidence bearing on the

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14. H.R. Rep. No. 94-1976, 94th Cong., 2d Sess. 66 (1976), reprinted 1970 U.S. Code Cong. & Ad. News, 5659, 5680; Sen. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975).

15. Although the Ninth Circuit heavily relied on other portions of Nimmer, it elected to disregard his recognition of the fact that a determination of fair use requires consideration of all of the evidence in a particular case.

issues of infringement and fair use, including each of the specific factors listed in Section 107, and concluded that in-home recording of copyrighted television broadcasts for private viewing purposes was a fair use, rather than an infringement, because it did not injure the copyright owner's economic interests or otherwise adversely affect the balance between artistic reward and public access. The decision of the *Sony* Trial Court is not clearly erroneous as a matter of fact, and was based on an entirely correct discussion and application of the relevant law. It should have been affirmed.

II.

The Ninth Circuit decision improperly makes technology subservient to the Copyright Law.

One basic issue in this controversy is whether the Copyright Law should control new technology rather than be adapted to accommodate it. The Ninth Circuit, in rejecting the rationale of *Williams v. Wilkins,* which holds that library photocopying is fair use, expressed its attitude on this question as follows:

> "New technology which makes possible the mass reproduction of copyrighted material (effectively taking control of access from the author), places a strain upon the fair use doctrine." 659 F. 2d at 971.

In contrast, Congress clearly stated that it was not disposed to freeze the doctrine of fair use "during a period of rapid technogical change." Similarly, this Court in stating that the Copyright Law must be construed in the light of its basic purpose, rather than literally, as technology changes, offered the almost 200 year old words of Lord Mansfield as a guide:

> "[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may

> not be deprived of improvements, nor the progress of the arts be retarded." *Aiken,* 422 U.S. at 156.

On three separate occasions during the past two decades, this Court has applied these principles to prevent attempts by copyright proprietors to gain control over instrumentalities which increased public access to copyrighted works.[16] Each of *Fortnightly, Teleprompter* and *Aiken,* like *Sony*, raised copyright infringement questions in connection with the reception of publicly broadcast video or audio material for which the copyright proprietor had received payment prior to such broadcast.

Further, in each of the foregoing cases, the copyright proprietors urged that infringement existed because the activity charged as infringement made the copyrighted broadcast accessible to viewers or listeners who would not otherwise have seen or heard it, and that the party charged with infringement had directly profited by providing increased access to the copyrighted work.[17] This Court rejected that approach and stated:

> "But mere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement—not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed, every television set manufacturer. Rather, resolution of the issue before us depends upon a determination of the function that CATV

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16. *Fortnightly; Teleprompter; and Aiken.* A much earlier example of the Court's consistent attitude toward emerging technologies is its refusal to find that a piano roll capable of performing a copyrighted musical work was a "copy" of the musical composition within the meaning of the 1907 Copyright Act. *White-Smith Music Pub. Co. v. Apollo Co.,* 209 U.S. 1 (1907).

17. *Fortnightly* involved a CATV system which retransmitted copyrighted broadcasts within the local broadcast range to people with poor direct television reception. *Teleprompter* involved the importation of distant television broadcasts into a local viewing area by a CATV system. *Aiken* involved the playing of a copyrighted radio broadcast in a public business establishment.

> plays in the total process of television broadcasting and reception." *Fortnightly*, 392 U.S. at 397.

The direct applicability of this statement to the use of VTRs is apparent.

Of even greater significance is this Court's emphasis on whether the increased public access which admittedly flowed from CATV interfered with any legitimate right of the copyright owner which the Copyright Law was designed to protect. In addressing that question in *Teleprompter*, this Court stated:

> "By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holder's means of extracting recompense for their creativity or labor. When a broadcaster transmits a program under license from the copyright holder, he has no control over the segment of the population which may view the program—the broadcaster cannot beam the program exclusively to the young or to the old, only to women or only to men—but rather he gets paid by advertisers on the basis of all viewers who watch the program. The use of CATV does not significantly alter this situation. Instead of basing advertising fees on the number of viewers within the range of direct transmission plus those who may receive 'local signals' via a CATV system, broadcasters whose reception ranges have been extended by means of 'distant signal' CATV rechanneling will merely have a different and larger viewer market." *Teleprompter*, 415 U.S. at 412.

This Court went on to state that broadcasters and copyright proprietors could readily make adjustments in their licensing arrangements so as to compensate copyright proprietors for the increased audience size made possible by CATV systems. *Teleprompter*, 415 U.S. at 413. Thus, in the Court's view, copyright proprietors must adjust to technological changes which have an impact on public access to their works and may not control that access through suits for copyright infringement.

The basic holding of *Teleprompter* was reinforced in *Aiken*, where this Court concluded that it would be "wholly unenforceable" and "highly inequitable" to require the owners of business establishments to pay royalties for playing their radios in public places. *Aiken*, 422 U.S. at 162. The Court found that copyright proprietors are paid by broadcasters for the public broadcast of a copyrighted work, and that any additional payment by store owners for that same public broadcast simply because a radio is played in a place where other people can hear it, would result in the payment of a multiple tribute going far beyond that which is required for the economic protection of copyright owners. *Aiken*, 422 U.S. at 163. The Court also recognized that the Copyright Law must yield to the reality that any holding of infringement could not be equitably or practically enforced in view of the countless existing radios in small business establishments. *Aiken*, 422 U.S. at 162.

All of the fundamental logic, and even the specific analysis and language, of *Fortnightly, Teleprompter* and *Aiken* are applicable to *Sony* and the use of VTRs in the privacy of a person's home. VTRs simply increase viewer access to televised programs by expanding the *time* when those broadcasts can be enjoyed just as CATV and publicly played radios expanded the *place* of enjoyment. But the copyright proprietor was paid for that broadcast by the broadcaster; the advertiser paid the broadcaster; and viewers indirectly paid for the privilege of viewing the copyrighted broadcast through increased prices for the products and services of the advertisers. *Teleprompter*, 415 U.S. at 412.

Admittedly, *Fortnightly, Teleprompter,* and *Aiken* involved a determination of whether or not the copyrighted works had been "performed" and, therefore, infringed within the meaning of the Copyright Act, whereas, the use of a VTR technically raises a somewhat different, but closely related, infringement issue because it produces a "copy" of the copyrighted work for private viewing purposes. However, any attempt to distinguish *Fortnightly, Teleprompter* and *Aiken* from *Sony* on that ground, is an exercise in semantics rather than substance. In *Fortnightly,* this Court made it clear that the word "perform" was not limited either to its ordinary meaning or by its legislative history in the Copyright Act, and that infringement would be determined by looking at the impact which the challenged CATV activity had on the total

broadcasting process. In *Aiken,* this Court clearly stated that the Copyright Act could not be construed literally, in the face of changing technology, but must be construed in the light of its basic purposes. *Fortnightly,* 392 U.S. at 395; *Aiken,* 422 U.S. at 156.

In each of *Fortnightly, Teleprompter,* and *Aiken,* this Court, in reaching a decision on the infringement issue, considered precisely the same types of factors as would be considered in a "fair use" analysis. Thus, the fact that the VTR in *Sony* makes a complete "copy" for private viewing purposes in the course of time-shifting a copyrighted audiovisual work is of no greater significance to the ultimate infringement analysis than was the public reception and performance for profit of the complete copyrighted radio broadcast in *Aiken* or the transmission for profit of complete television programs in *Fortnightly* or *Teleprompter.* It is simply one factor, rather than the dispositive factor, in determining whether the rights of a copyright proprietor have been violated in a manner which the Copyright Act is designed to protect.

The Ninth Circuit's concern about the adverse impact of new technology on copyrights clearly stems from a misconception about the degree of control which the Copyright Law intends to give authors over access to their works. It confuses the author's right to exercise control over reproductions of a copyrighted work for commercial purposes with the public's right to use and enjoy such work, and mistakenly concludes that authors are entitled to control the delivery systems, such as VTRs, capable of reproducing a copyrighted work and not simply the commercial reproduction of the work itself.

The Copyright Law was simply not designed or intended to permit copyright proprietors to exercise control over the manufacture, distribution, sale or advertising of printing presses, cameras, radios, televisions, photocopying machines, or audio tape recorders, nor would such control make any sense since all of these instrumentalities, like the VTRs involved here, are capable of reproducing both copyrighted and uncopyrighted works and, indeed, of creating new works. The existence of these instrumentalities has actually served to increase the rewards available to copyright proprietors by increasing the number of

techniques capable of delivering copyrighted works to a mass audience at a reasonable price. In fact, public access to a copyrighted work has always been a function of the nature of the work and the technology available to reproduce or disseminate it.

For example, under current law, copyright proprietors in books or other written works normally must seek their reward in an environment where the market for their work is reduced by free public libraries, rental libraries, book swapping, and other such alternatives made possible by the first sale doctrine[18] all of which provide free or inexpensive access to copyrighted works without additional remuneration to authors. Technological advances in the field of printing have made paperback books possible, and consumers now have the option of owning a cheaper permanent copy of a book as a more convenient alternative to borrowing from libraries. Such innovations have increased the potential rewards for authors. However, any attempt by an author to control the time or place in which a book is read would offend the most basic concepts on which our free society is based.

Photocopy technology has further reduced the copyright proprietor's control over access to written works. Obviously, it is beyond the practical reach of the Copyright Law to prevent the purely private use of this technology to copy articles or even books. Indeed, even organized library photocopying has been statutorily exempted from infringement actions subject to certain guidelines despite the fact that such copying may diminish the market for a copyrighted work. 17 U.S.C. §108. Congress apparently believed (as did this Court in *Aiken*) that the need to reward authors must operate within the realities of new technology and the impracticality of any attempt to control such use by individuals.

In contrast to books, public access to audiovisual works has been practically limited because of the unavailability of technology

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18. 17 U.S.C. §109(a). The doctrine of first sale is intended to balance the conflict between the monopoly created by the Copyright Law and the free enterprise system by treating the monopoly as being exhausted once the copyright owner has obtained a reasonable reward. *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*, 233 F. Supp. 881, 884 (E.D. Pa. 1964).

suitable for individualized delivery systems. It simply was not economically feasible to provide for individuals to watch a film when or where they desired; and motion picture theatres and television represented the only practical delivery systems for audiovisual works. This lack of technology, and not any provision or purpose of the Copyright Law, previously gave the proprietors of audiovisual works greater control over both access to copies of their works and the time, place and manner of enjoyment. As a result, the practice of licensing audiovisual works for exhibition became a standard technique for remunerating copyright proprietors.

VTRs now make it possible for the consumers of audiovisual works to have the same control over the time when those works are enjoyed as has always been true for books. Pre-recorded video cassettes, pay TV systems, and other delivery systems are changing both access to audiovisual works and the means of remunerating copyright proprietors. Universal wishes to exploit the economic benefits which they are enjoying as a result of these newer forms of technology, while simultaneously retaining the same level of control over access to its works which was made possible only by the absence of that technology.

Time-shifting of television broadcasts does not involve any injury to the copyright proprietor who invited the viewer to view the broadcast program and who was paid by the broadcaster and, indirectly, by the advertiser and viewer. In seeking to extract a royalty on both the sale of VTRs or blank video cassettes and on the initial broadcast of a copyrighted television program, Universal is clearly looking for precisely the same type of multiple tribute for a single public broadcast which was condemned in *Aiken*. Such multiple tribute violates the spirit of the first sale doctrine and is an unnecessary interference with the development and use of a beneficial new technology.

III.

The economic facts support the *Sony* Trial Court's holding that there is no infringement.

With the notable exception of the Ninth Circuit's opinion, there is essentially unanimous agreement that the issue of economic

harm to the copyright proprietor is the most important issue in determining whether a particular activity is a copyright infringement or a fair use. Even Nimmer has characterized economic impact as "the most important, and indeed, central fair use factor."[19] The *Sony* Trial Court properly held that the harm issue was primary, and the parties gave it most emphasis at trial. 480 F. Supp. at 450. In contrast, the Ninth Circuit erroneously concluded, based on its finding that there had been excessive copying for intrinsic purposes, that "we do not believe it is necessary to address the harm issue with respect to the liability question." 659 F. 2d at 973. The Ninth Circuit's ensuing discussion of the economic harm issue merely repeats that Court's basic belief, relying primarily on opinions expressed in *Nimmer on Copyright*, that copying for intrinsic purposes can never be fair use. Ironically, the latest version of the *Nimmer* treatise states that "the weakest portion of the *Sony* opinion lies in its rather sketchy treatment of the fourth [economic] factor." 3 *Nimmer on Copyright*, §13.05[F] at 13-99.[20]

The *Sony* Trial Court found that Universal had admitted that no actual harm to its copyrights had occurred and that predictions of future harm were based on unsupportable personal belief and speculation. 480 F. Supp. at 451, 466-467. The Trial Court took special note of the facts that Universal is paid substantial sums of money for its copyrighted works by the broadcast networks before consumers get any opportunity for private in-home recording;[21] that the use of the public airwaves provides Universal with the opportunity to disseminate its works more widely than it ever could on its own and has been very profitable;[22] that Universal's profits from television have increased in each year including the years in which VTR technology was introduced, and are still growing;[23] and that the situation presented by VTRs was

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19. *Nimmer on Copyright*, §13.05[A][4] at 13-64 (1982); *Triangle Publications v. Knight-Ridder Newspapers*, 626 F. 2d at 1175.

20. Nimmer's position with respect to the Ninth Circuit opinion demonstrates the wisdom of basing judicial decisions on immutable precedent rather than scholarly criticism of that precedent which, as demonstrated here, is subject to continuing refinement and change.

21. 480 F. Supp. at 452.

22. 480 F. Supp. at 453.

23. 480 F. Supp. at 452.

analogous to the multiple tribute situation which this Court confronted in *Teleprompter* and *Aiken*.[24] All of these factual considerations, along with the private and non-commercial nature of in-home video recording, convinced the *Sony* Trial Court that Universal's speculations concerning potential future harm could not be taken seriously. To the contrary, the *Sony* Trial Court noted that the motion picture industry had proven itself to be resilient to changes in market practices arising from other innovations such as CATV and pay television and that VTRs and other technological advances would undoubtedly further change the industry and introduce new marketing considerations.[25]

The fundamental wisdom and, indeed, prophetic nature of the *Sony* Trial Court's decision is demonstrated by the realities of the marketplace as the number of VTR households has grown from no more than a few hundred thousand (at the time of the *Sony* trial) to several million.[26] Universal's speculations concerning decreases in the size of theatre going audiences and television audiences as a result of VTR use have simply not materialized. To the contrary, Universal and other motion picture producers are on the threshold of a truly golden era in which VTRs and other innovations are providing them with a new array of systems for delivering their products to a massive new audience and for collecting rewards commensurate with the size of that audience. The potential revenue sources for Universal films are no longer limited to motion picture theatres and "free" television, but also include the sale and rental of pre-recorded video cassettes and video discs; subscription television; pay per view television in which the viewer can individually select and pay for specific programs; and direct broadcast satellites.[27] Indeed, viewers will soon be offered a pay television service which will broadcast televised films directly to their VTRs while they sleep.[28] Obviously, the size of

24. 480 F. Supp. at 453.

25. 480 F. Supp. at 452.

26. It is estimated that over 4.5 million VTRs will have been sold in the United States by the end of 1982. Electronics Industry Association, *Consumer Electronic Sales By Product Category*, June, 1982.

27. *The Wall Street Transcript*, January 4, 1982.

28. *The Wall Street Journal*, April 30, 1982; *The New York Times*, August 5, 1982. This, indeed, is the ultimate in time-shifting and demonstrates motion picture industry recognition that time-shifting is a legitimate activity which is not economically detrimental.

audiences for "free", advertiser sponsored television are of diminishing concern to Universal in the face of new delivery systems which promise greater remuneration. Nevertheless, the revenues of Universal and its competitors from these conventional sources continues to grow.[29]

A recent article describing the "carefully orchestrated campaign" to "extract every last penny" from the motion picture "Star Wars" illustrates the typical new marketing pattern for movies.[30] That article states:

> "First off, Twentieth Century Fox is releasing 'Star Wars' as a rental-only home video cassette, followed after three months by the outright sale of video cassettes. Next, the movie will be re-released in a thousand theatres around the country. Then it will be offered as a pay-per-view cable attraction. Finally, next February, it is the cable networks' turn-followed a year later with the movie's broadcast premiere on CBS-TV."

The suggestion by the *Sony* Trial Court that Universal and others in the motion picture industry would profitably adapt to VTRs is perhaps most dramatically demonstrated by the incredible expansion in the sale and rental of pre-recorded video cassettes. Well over 35,000 different pre-recorded video programs are currently available, and the domestic home video industry generated over $300,000,000 in retail sales and rentals of pre-recorded video cassettes in 1981.[31] There are now over 10,000 retail outlets for the sale or inexpensive overnight rental of pre-

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29. MCA Inc. 1981 Annual Report. The revenues of MCA, Inc., parent of Universal City Studios, Inc., from television have increased by almost 50%, and its revenues from "other" filmed entertainment, which includes pre-recorded video tapes and discs, has grown by 300% since the *Sony* trial. The Warner Communications Inc. 1981 Annual Report shows similar growth patterns for the industry leader.

30. *On Cable*, July, 1982.

31. National Video Clearing House, Inc., *The Video Source Book* (3rd Ed., 1981); Warner Communications, Inc. Annual Report 1981, p. 28.

recorded video cassettes, and the ability of VTRs to play pre-recorded video cassettes is second only to time-shifting as an inducement to purchase a VTR.[32]

These facts demonstrate that Universal and others in the motion picture industry are clearly engaged in the active inducement of consumers to purchase VTRs. The claim of irreparable harm and damage caused by the existence of VTRs has been deprived of any potential credibility in view of this activity. It was certainly not necessary for Universal to make its films available in a form capable of playback on VTRs. It could have limited the availability of its copyrighted properties to video disc players which lack the recording capability of VTRs. Obviously, Universal believes that the recording capability is, and will continue to be, an important consideration (and inducement) in the consumer's video equipment purchasing decision, and it is desirous of encouraging VTR purchases because of the large potential profit to be derived from the sale and rental of pre-recorded cassettes to the growing number of VTR households. Undoubtedly, the enormous profit potential in pre-recorded programs is one of the many factors which have led Universal to publicly disavow[33] any desire to enjoin the use or sale of VTRs and to lobby heavily for new legislation which would incorporate a version of the compulsory licensing remedy suggested by the Ninth Circuit.[34] Such a licensing remedy is not only legally unsupportable as a multiple tribute for the reasons set forth in *Teleprompter, Aiken* and the decision of the *Sony* Trial Court, but would amount to an unnecessary judicial interference with the free marketplace.

At trial, Universal acknowledged that syndication fees for the secondary distribution of television programs were directly and

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32. Mart Magazine, Video Recording Consumer Survey, September, 1981. It is also noteworthy that pre-recorded video cassette rentals are outdistancing sales by 12 to 1—a statistic which is consistent with the finding of the *Sony* Trial Court, 480 F. Supp. at 467, that the building of a permanent library of recorded programs would not be a significant use of VTRs. *Home Video*, April, 1982, p. 46.

33. Statement of Sid Sheinberg, President, MCA, Inc. *ABC News Nightline*, November 16, 1981.

34. H.R. 5705.

proportionately related to the size of the audience for the original program. 480 F. Supp. at 467. The use of VTRs for time-shifting purposes is measurable and serves to increase the size of the original audience, thereby making the syndication rights more valuable.[35] 480 F. Supp. at 466. Moreover, the value received in syndicating motion pictures to television has always been a function of box office receipts and other similar factors related to an estimate of the potential audience size for a film.[36] That data will now be augmented by similar data from subscription television, pre-recorded video cassette sales and rentals, and other existing delivery systems, all of which will permit the marketplace to determine the appropriate compensation to copyright proprietors before a program finally is released to free television.

IV.

There is no contributory infringement even if in-home recording is direct infringement.

The *Sony* Trial Court found that the manufacturer, distributor, retailers and advertisers of VTRs would not be liable for inducing or contributing to infringement within the standard defined in *Gershwin Publishing Corp. v. Columbia Artist Management, Inc.*, 443 F. 2d 1159, 1162 (2d Cir. 1971) even if in-home recording is a direct infringement.[37] The Trial Court's holding was based entirely on findings of fact which were not clearly erroneous and which, therefore, could not properly be set aside by the Ninth Circuit. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 50 U.S.L.W. 4592 (1982). Those factual findings include the following:

a. No advertisements or other statements by the manufacturer, distributor, retailers or

35. The value of time-shifting in preserving and expanding the audience for a soap opera or continuing drama is obviously of great benefit to both broadcasters and advertisers, and therefore to the potential compensation paid for the copyrighted work.

36. Zaleski, *Successful Syndication of Completed Motion Pictures to Television*, Fifth Annual U.C.L.A. Entertainment Symposium, 1980.

37. 480 F. Supp. at 429.

> advertisers of VTRs had induced the individual defendant or any other individual who testified at trial to record copyrighted works off-the-air. 480 F. Supp. at 459.
>
> b. VTRs are staple articles of commerce which have substantial non-infringing uses, including the recording of educational, religious and sports programs and of other programs which are uncopyrighted, uncopyrightable, or copied with consent. 480 F. Supp. at 465, 468.

The Ninth Circuit, in total disregard of the clearly erroneous rule, rejected these purely factual findings and held that the *Sony* Trial Court's reliance on the staple article of commerce theory was inappropriate because:

> "Video tape recorders are manufactured, advertised and sold for the primary purpose of reproducing television programming. Virtually all television programming is copyrighted materia'. Therefore, video tape recorders are not 'suitable for substantial non-infringing use.' See 3 *Nimmer, supra,* §12.04[A] at 12-39, 12-40. That some copyright owners choose, for one reason or another, not to enforce their rights does not preclude those who legitimately choose to do so from protecting theirs." 659 F. 2d at 975.

There is not a shred of evidence to support any of these contrary "factual findings" by the Ninth Circuit. It is palpably obvious, even in the absence of the Trial Court's findings, that there are substantial amounts of TV programming which are uncopyrighted, uncopyrightable, the subject of expired copyrights or copied with consent. Given these undisputable facts, it was clearly erroneous for the Ninth Circuit to engage in unwarranted characterizations of either the primary purpose of those engaged in the sale or distribution of VTRs or the primary use by consumers. An appellate court cannot substitute its interpretation of the evidence for that of a trial court or give "a more sinister cast to actions which the District Court apparently deemed innocent." *Inwood,* 50 U.S.L.W. at 4596.

The Ninth Circuit's finding of contributory infringement based on factual suppositions bears a striking resemblance to an approach condemned in *Inwood* by this Court. *Inwood* held that manufacturers are not contributorily liable for the acts of customers which violate the rights of third parties solely because the manufacturer can reasonably anticipate that some customers might engage in such conduct. Rather, the evidence must establish that the manufacturer actively participated in or directly induced the infringing acts. Obviously, if a product has a multiplicity of uses, some of which would infringe a copyright and some of which would not, the existence of the non-infringing uses would preclude a finding that the manufacturer had contributed to the infringing uses simply because he could "reasonably anticipate" that some customers might engage in those uses. *Inwood,* 50 U.S.L.W. at 4596. The "substantial non-infringing use" or "staple article of commerce" defense to contributory infringement, which has been specifically applied by this Court in patent cases such as *Aro,* is simply a facet of the doctrine discussed in *Inwood* and its logic is clearly applicable whether the issue is patent infringement, unfair competition or copyright infringement.

The Ninth Circuit's motivation in erroneously making judgmental findings about the intent of manufacturers and consumers is apparent from its opinion. It recognized, as this Court did in *Aiken,* that a decision holding homeowners liable for direct infringement would be wholly unenforceable not only because it would require millions of lawsuits but also because it would intrude on acts committed in the privacy of an individual's home.[38] Indeed, it was the recognition that private in-home audio recording was essentially uncontrollable that led Congress to state that in-home audio recording was exempt from charges of copyright infringement.[39] In contrast, the Ninth Circuit erroneously believed that it was obligated to "legislate" a solution to what it perceived to be the "cumulative effect of mass reproduction of copyrighted works made possible by VTRs."[40]

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38. The individual defendant, William Griffiths, admitted infringement in this case in exchange for a release and was not even represented by counsel. Appendix to the petition for writ of certiorari pp. 43-4.

39. 659 F. 2d at 967.

40. 659 F. 2d at 973.

CONCLUSION

The Copyright Law was not designed or intended to permit copyright proprietors to exercise control over either new developments which increase access to copyrighted works or the private, non-commercial copying of copyrighted works. The marketplace is much more adequately suited to accomplish the basic objectives of providing reasonable reward to copyright proprietors without impeding the public's access to and enjoyment of both copyrighted works and the benefits of new technology. These basic principles are particularly applicable to the private in-home use of VTRs since off-the-air recording of copyrighted broadcasts can only occur after the copyright proprietor has already been paid for releasing the copyrighted work. Accordingly, off-the-air recording for personal use is a fair use and not an infringement.

Respectfully submitted,

ALFRED B. ENGELBERG
MORTON AMSTER
JESSE ROTHSTEIN
ANTHONY F. LoCICERO
JOEL E. LUTZKER

AMSTER, ROTHSTEIN
& ENGELBERG
Attorneys for Amici Curiae

Amicus Brief

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No. 81-1687
IN THE

Supreme Court of the United States

October Term, 1982

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF HITACHI, LTD. AND HITACHI SALES CORPORATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS.

JOHN W. ARMAGOST,
(Counsel of Record),
CRAIG B. JORGENSEN,
ROBERT H. TAKEUCHI,
JOHN K. HART,
STEVEN P. RICE,
KINDEL & ANDERSON,
555 South Flower Street,
Twenty-Sixth Floor,
Los Angeles, Calif. 90071,
(213) 680-2222,
Attorneys for Hitachi, Ltd. and Hitachi Sales Corporation of America as Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

Assuming *arguendo* that the use of videotape recorders ("VTR's") to record free off-the-air television programming for private home viewing is an infringement of statutory copyright on such programming, does the mere manufacture and distribution of VTR's constitute contributory infringement?

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No. 81-1687

IN THE

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October Term, 1982

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

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UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF OF HITACHI, LTD. AND HITACHI SALES CORPORATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS.

dios, Inc., et al., v. RCA, et al.," Civil No. 81-5723 FW, was commenced within weeks after the Court of Appeals' decision herein, and in obvious reliance thereon, and states substantially the same causes of action as the instant case. The action has been stayed pending the decision of the Court herein. Since the two decisions below currently stand as the only authority considering the question presented, the Court's action in this case will obviously have a profound impact upon the outcome of the new litigation.

Hitachi and HSCA accordingly are legitimately interested in petitioners' prayer that this Court reverse the Court of Appeals' decision below, which decision, if left undisturbed, creates the specter of unwarranted and far-reaching liability not only for Hitachi and HSCA but for all manufacturers and distributors of VTR's.

Summary of Argument.

In this Brief, Hitachi and HSCA demonstrate that, under traditional copyright analysis, under concepts borrowed from the analogous law of patents, and under an important principle of public policy, the manufacturers and distributors of VTR's should not be held liable as contributory infringers for the alleged copyright infringements of home users.

Although this Court has not squarely addressed the issue and although the decisions of the lower courts are in somewhat of a state of disarray, the consensus of authority, broadly speaking, is that contributory liability for copyright infringement will be imposed only upon those who knowingly induce, cause, or otherwise materially contribute to an infringing activity. The manufacturers and distributors of VTR's are not implicated by any of the elements of this test. First, the knowledge of the manufacturers and distributors — that the use of VTR's to copy copyrighted television programming is but one of many uses, most of which are

Preliminary Statement.

This Brief is submitted by Hitachi, Ltd. ("Hitachi") and Hitachi Sales Corporation of America ("HSCA") as *amicus curiae* in support of petitioners' prayer that this Court reverse the judgment and opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered in the above-entitled action on October 19, 1981.

As required by Rule 36 of the Rules of this Court, the parties to this action have consented to the filing of briefs *amicus curiae*, which consent is on file with the Clerk of this Court.

Interest of Hitachi, Ltd. and Hitachi Sales Corporation of America.

Hitachi is a Japanese corporation engaged in, among other things, the business of manufacturing VTR's. HSCA is a California corporation engaged in, among other things, the business of distributing Hitachi VTR's in the United States.

Hitachi and HSCA have a vital interest in seeing that this Court reverse the Court of Appeals' decision below for two reasons.

First, as manufacturers and distributors of VTR's, Hitachi and HSCA stand in a similar position to petitioners and will be significantly affected by the outcome of this litigation and the impact which it will inevitably have on the home VTR industry.

Second, Hitachi and HSCA are among the defendants in an action recently brought by respondent Universal City Studios, Inc. in the United States District Court for the Central District of California against fifty manufacturers, distributors, and advertisers of VTR's which together comprise virtually the entire remainder of the home VTR industry. The action, which is entitled "Universal City Stu-

unquestionably non-infringing, to which the product may be put — is simply not sufficient to justify liability. Second, the manufacturers and distributors of VTR's cannot be said to induce, cause, or materially contribute, knowingly or unknowingly, to the alleged infringing activity because they do not have the ability to police the home use of VTR's, because their financial interest ends once the product is sold and is not affected by the use to which the product is put, and because their advertisement and promotion of VTR's is not improper.

Under the federal patent statute and the case law developed thereunder, and which have been cited in part by the lower courts herein, the manufacturers and distributors of VTR's are also innocent of contributory infringement. This is so, first, because the manufacturers and distributors have insufficient knowledge of the infringing use of the product and, second, because VTR's are staple articles of commerce suitable for substantial non-infringing use. Furthermore, this lawsuit constitutes an attempt by respondents to misuse their copyright monopoly by tying a protected property (their copyrighted television programming) to an unprotected activity (the use of VTR's generally) — clearly, a "copyright misuse."

Aside from the statutory and decisional law of copyrights and patents which relieves the manufacturers and distributors of VTR's from respondents' accusation of contributory copyright infringement, an important principle of public policy serves the same purpose. Respondents have acknowledged that VTR's have only a negligible impact, if any, upon their copyrights. Indeed, the fact is that respondents have richly benefited from the introduction of VTR's. In view of these facts, it would be a most unfortunate perversion of copyright law to protect respondents' marginal copyright interest at the expense of the many non-infringing

uses of VTR's. The American public and American commerce should not be deprived of this new technology, with all its promise, on such shallow grounds as those propounded by respondents.

For these reasons, this Court should grant petitioners' prayer that the Court of Appeals' decision below be reversed.

ARGUMENT.

I.

UNDER TRADITIONAL COPYRIGHT ANALYSIS, THE MANUFACTURERS AND DISTRIBUTORS OF VTR'S ARE NOT GUILTY OF CONTRIBUTORY INFRINGEMENT.

A. The Test.

The Court of Appeals and the district court both agreed on the standard which should be applied in evaluating the contributory liability of the manufacturers and distributors of VTR's. That standard is as follows:

> One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a "contributory" infringer.

Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

Although the standard enunciated in *Gershwin* may be accurate as a broad statement of legal principle, it is important to note that it is but one court's distillation of a large body of case law promulgated by the lower federal courts without any effective guidance from this Court.[1] The *Gershwin* standard should not, therefore, be followed mechanistically, but rather should be used only as a framework within which to apply the specific rules set forth in other cases and indeed in *Gershwin* itself.

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[1] In *Kalem Co. v. Harper Brothers*, 222 U.S. 55, 62-3 (1911), this Court held that the exhibition of a motion picture dramatization of the novel "Ben Hur" infringed the author's copyright. The Court further held that the producer of the film was guilty of copyright infringement. The Court justified this latter holding on the grounds that, even though the producer did not exhibit the film himself, he sold prints to others who arranged for its exhibition and he advertised the film, all with the obvious expectation that it would be seen by the public. Although the case is cited as authority on contributory infringement, it is, by virtue of special facts and limited statement of general principle, of little guidance in this action.

B. Although the Manufacturers and Distributors of VTR's Have Knowledge That VTR's May Be Used, Among Many Other Things, to Copy Copyrighted Television Programming, This Knowledge Is Not Sufficient to Justify Liability.

The knowledge component of the *Gershwin* standard is missing in this case.[2]

Although VTR's can obviously be used to record respondents' copyrighted television programming, they also can be used to record other copyrighted television programming (with or without the consent of the copyright holder), to record uncopyrighted television programming, for viewing commercially prepared videotapes, and for creating and viewing home-made family movies. The manufacturers and distributors of VTR's "know" that all of these uses are possible. However, this is not adequate knowledge to permit a finding of contributory liability.

This Court has noted that "the mere indifferent supposition or knowledge on the part of the seller that the buyer [is] contemplating [an] unlawful use is not sufficient to connect him with the possible unlawful consequences." *Kalem Co. v. Harper Bros., supra*, 222 U.S. at 62. Certainly, the manufacturers and distributors of VTR's can make no more than an "indifferent supposition" as to the use to which their product will be put by consumers.

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[2]Knowledge may be actual or imputed, and this section discusses both types. However, three factors which have been used to impute knowledge — ability to police an infringing activity, financial interest in an infringing activity, and advertisement and promotion of an infringing activity — are reserved for discussion in connection with the second part of the *Gershwin* test since they are more typically thought of as means whereby an alleged contributory infringer "induces, causes, or materially contributes" to copyright infringement. *See infra*, at 11-13.

The lower courts have joined in this Court's statement in *Kalem Co.*, holding that, in order for contributory liability to attach, the alleged contributory infringer must act with the knowledge that the primary infringer will infringe a particular copyright or class of copyrights.[3]

Clearly, the manufacturers and distributors of VTR's have no knowledge of the identity of any purchasers and no knowledge of whether any unit will be used to infringe any copyrights, including respondents' copyrights. The manufacturers and distributors are merely links in the economic chain through which individual infringers acquire the passive instrumentality which they use to infringe. Under the case law, contributory liability cannot be found in such a situation. The knowledge that it is possible that *some unknown* infringer may misuse *some unknown* VTR to violate *some unknown* statutory copyright does not render the manufacturers and distributors contributorily liable.

In its opinion, the district court herein recognized the above analysis. The court found that the manufacturers and distributors of VTR's do not have sufficient actual knowledge to justify the imposition of contributory liability.[4] The court also found that knowledge could not be imputed to the manufacturers and distributors because they could not previously have known, and even now cannot know, that the recording of copyrighted television programming by means of VTR's is an infringing activity.[5]

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[3]*E.g., Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947); *Elektra Records Co. v. Gem Electronic Distributors, Inc.*, 360 F. Supp. 821 (E.D.N.Y. 1973); *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966).

[4]*Universal City Studios, Inc. v. Sony Corporation of America*, 480 F. Supp. 439, 460 (C.D. Cal. 1979).

[5]*Id.* at 459.

The Court of Appeals, on the other hand, committed two fatal errors in its review of this aspect of the district court's decision.

First, the Court of Appeals ignored the district court's conclusion that the manufacturers and distributors of VTR's do not have knowledge of the infringing uses to which their product is put and instead concluded that such knowledge is present.[6] This conclusion was reached by the Court of Appeals without citation to the record and without reference to any case authority. It is reversible error.

Second, the Court of Appeals held that, regardless of whether the manufacturers and distributors of VTR's had knowledge of the infringing use of their product or not, said knowledge does not go to liability but rather only to the amount of damages which respondents can recover.[7] The Court of Appeals makes this bold assertion also without the benefit of any authority. It is simply incorrect. Knowledge, whether actual or imputed, is an absolutely essential prerequisite for the imposition of liability for contributory copyright infringement. This is a thread that runs through all of the applicable cases from *Kalem Co.* to *Gershwin*.[8] The Court of Appeals' attempt to impose strict liability upon the manufacturers and distributors of VTR's is completely without precedent or justification.

C. The Manufacturers and Distributors of VTR's Do Not Induce, Cause, or Otherwise Materially Contribute to Any Infringing Use of the Product.

The second part of the *Gershwin* standard requires that a contributory infringer make some contribution, by action or inaction, to the infringing activity.

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[6] *Universal City Studios, Inc. v. Sony Corporation of America*, 659 F.2d 963, 975 (9th Cir. 1981).

[7] *Id.*

[8] *See, e.g., Kalem Co. v. Harper Brothers, supra*, 222 U.S. at 62; *Gershwin Publishing Corp. v. Columbia Artists Management, Inc., supra*, 443 F.2d at 1162.

The *Gershwin* court imposed a high materiality requirement upon this aspect of its standard, footnoting the applicable portion of its decision with a reference to and quotation from this Court's opinion in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).[9] To demonstrate the type of analysis which it anticipated would take place under the second part of its standard, the *Gershwin* court quoted, in part, the following portion of this Court's opinion:

> [M]ere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement — not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed, every television set manufacturer. Rather, resolution of the issue before us depends upon a determination of the function [the alleged infringer] plays in the total [reproduction] process . . .

Fortnightly Corp. v. United Artists Television, Inc., supra, 392 U.S. at 397.

Under this strict standard of materiality, the manufacturers and distributors of VTR's cannot be held liable for the infringing activity of home users.

Certainly, the manufacture and distribution of VTR's is not a significant part of the alleged infringing activity in this case. The manufacturers and distributors merely make available to the public a passive instrumentality which is capable of many uses, one of which happens to be an alleged

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[9]*Gershwin Publishing Corp. v. Columbia Artists Management, Inc., supra.*

violation of federal copyright law. The viewer selects: the programming to be copied out of the enormous pool available; the time, place, and method of copying; and the time, place, and method of display. Thus, the viewer is the active party, making all of the critical choices which determine whether or not a given use will be infringing.

The manufacture and/or sale of an instrumentality used in committing copyright infringement has never before been the sole basis for a finding of contributory liability. The courts have analyzed the situation where the alleged contributory infringer has furnished the direct infringer only with the copyrighted work;[10] the courts have analyzed the situation where the alleged contributory infringer has furnished the direct infringer with both the instrumentality and the copyrighted work;[11] but the courts have not analyzed the situation presented in this case where the alleged contributory infringer furnishes the direct infringer only with the instrumentality itself. Therefore, the Court of Appeals' decision below, in imposing liability upon the manufacturers and distributors of VTR's, takes a step which is unprecedented in the history of copyright law.

The district court found that this case presents none of the three facts which, under *Gershwin* and related cases, has previously been held sufficient to constitute material contribution to an infringing activity.[12] The Court of Appeals reversed this finding again without reference to the record and without reference to any authority other than a series

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[10]*E.g., Mount v. Book of the Month Club, Inc.*, 555 F.2d 1108 (2d Cir. 1977).

[11]*E.g., Elektra Records Co. v. Gem Electronic Distributors, Inc., supra.*

[12]*Universal City Studios, Inc. v. Sony Corporation of America, supra*, 480 F. Supp. at 460-61.

of law review articles.[13] The Court of Appeals' reversal of the district court's decision is clearly incorrect and should be overturned by this Court.

1. The Manufacturers and Distributors of VTR's Do Not Have the Ability to Police the Home Use of the Product.

The single most important finding which the cases imposing liability for contributory copyright infringement have in common is the right and ability, whether exercised or not, in the alleged contributory infringer to police the primary infringer.

This requirement has been discussed in a wide variety of cases.[14] However, none of these cases is even remotely analogous to this case.

In this case, the manufacturers and distributors of VTR's have no possible way of policing the home use of the product without changing the very nature of the product itself by, for example, installing some sort of jamming system or eliminating the record function altogether. Even assuming that these changes would be technically and economically feasible, it is totally unreasonable to impose a duty upon

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[13] *Universal City Studios, Inc. v. Sony Corporation of America, supra*, 659 F.2d at 975-76.

[14] *E.g., Gershwin Publishing Corp. v. Columbia Artists Management, Inc., supra*, 443 F.2d at 1162 (organization which promoted infringing concerts sponsored by an affiliated group had the "ability to supervise the infringing activity" and, therefore, for this and other reasons, was liable for contributory infringement); *Shapiro, Bernstein & Co., Inc. v. H. L. Green Co., Inc.*, 316 F.2d 304, 308 (2d Cir. 1963) (store owner was held liable for copyright infringement of phonograph record concessionaire, in part, because it had "the power to police carefully the conduct of its concessionaire"); *Boz Scaggs Music v. KND Corp.*, 491 F. Supp. 908, 913 (D. Conn. 1980) (vice-president/general manager of radio station held contributorily liable for the infringements of the station); *Davis v. E. I. duPont de Nemours & Company*, 240 F. Supp. 612, 631 (S.D.N.Y. 1965) (sponsor of infringing television program and its advertising agency held liable for contributory infringement, in part, because they had the right to approve of the program).

a manufacturer and distributor to change its product to prevent an infringing use at the expense of a multitude of non-infringing uses.

There is no realistic way by which the manufacturers and distributors of VTR's could police home use and, therefore, it is unfair to hold them accountable for such use. The district court agreed with this position.[15]

2. Once the Product Is Sold, the Manufacturers and Distributors of VTR's Do Not Have Any Financial Interest in the Use to Which It Is Put by Its Purchasers.

In a number of cases, the alleged contributory infringer's financial interest in the primary infringement has been held to be sufficient to support a finding that there was a material contribution to the unlawful act.[16]

The special factor of direct financial interest which has been found persuasive in certain cases is not applicable here.

The direct financial interest of the manufacturers and distributors of VTR's is limited to the purchase price of the product. The manufacturers and distributors of VTR's profit directly only from the sale of VTR's and not from the use of VTR's — whether the use is to copy respondents' copyrighted programming, to copy other copyrighted program-

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[15] *Universal City Studios, Inc. v. Sony Corporation of America, supra*, 480 F. Supp. at 462.

[16] *E.g., Gershwin Publishing Corp. v. Columbia Artists Management, Inc., supra* (organization which promoted infringing concerts sponsored by affiliated group was liable for contributory infringement, in part, because it was reimbursed for its expenses, was paid a commission, and was paid a percentage of the profits by the primary infringer); *Shapiro, Bernstein & Co., Inc. v. H.L. Green Co., Inc., supra* (store owner held liable for copyright infringement of phonograph record concessionaire, in part, because he received a percentage of sales proceeds); *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 456 (S.D.N.Y.) (owner of theater where infringing song was performed was contributorily liable, in part, because he received a percentage of ticket sales proceeds), *aff'd in part and modified in part*, 211 U.S.P.Q. 577 (1976).

ming, to copy uncopyrighted programming, to display commercially prepared videotapes, or to create and display home-made family movies.

Thus, the manufacturers and distributors of VTR's receive no financial benefit from the use of the product. The district court also agreed with this position.[17]

3. The Way in Which the Manufacturers and Distributors of VTR's Advertise and Promote The Product Is Not Sufficient to Justify the Imposition of Contributory Liability.

The case law also contains authority for the proposition that the way in which an infringing activity is advertised and promoted may lead to contributory liability.[18]

In this case, although VTR's are advertised, in part, as a means of copying television programming, they are not advertised as a means of copying copyrighted television programming nor as a means of copying respondents' copyrighted television programming.

This is not the type of active promotion which is anticipated by the *Gershwin* case and those cases which have followed it, and the district court so held.[19]

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[17] *Universal City Studios, Inc. v. Sony Corporation of America, supra.*

[18] *E.g., Gershwin Publishing Corp. v. Columbia Artists Management, Inc., supra* (organization which promoted infringing concerts sponsored by affiliated group was liable for contributory infringement, in part, because of its promotional activities); *Davis v. E. I. duPont de Nemours & Company, supra*, 240 F. Supp. at 631-32 (sponsor of infringing television program and its advertising agency were held liable for contributory infringement, in part, because of their promotional activities).

[19] *Universal City Studios, Inc. v. Sony Corporation of America, Inc., supra.*

II.

UNDER THE ANALOGOUS LAW OF PATENTS, THE MANUFACTURERS AND DISTRIBUTORS OF VTR'S ARE NOT GUILTY OF CONTRIBUTORY INFRINGEMENT.

A. The Test.

Both the district court and the Court of Appeals supplemented their analysis of this case by reference to patent law.[20]

The subject of contributory patent infringement is dealt with directly in the language of the federal patent statute. 35 U.S.C. §271 provides, in subsection (c), that liability for contributory patent infringement may be imposed as follows:

> Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer.

Both of the lower courts herein devoted their attention solely to that portion of subsection (c) which exempts the sale of a staple article of commerce "suitable for substantial non-infringing use".

B. The Manufacturers and Distributors of VTR's Do Not Have Sufficient Knowledge of the Infringing Use of the Product.

This Court has held that, under Section 271(c), an alleged contributory infringer must be shown to have actual knowledge that the "combination for which his component was

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[20]This Court has recognized that issues of copyright infringement may be resolved by resort to principles of patent infringement. *See Sheldon v. Metro-Goldwyn-Mayer Corp.*, 309 U.S. 390 (1939).

especially designed was both patented and infringing." *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488 (1964).

The manufacturers and distributors of VTR's have no such knowledge for a number of reasons.

First, VTR's may be used for a multitude of purposes, only one of which is allegedly infringing. VTR's may be used for copying copyrighted and uncopyrighted television programming, for displaying commercially prepared videotapes, and as a tool for the creation and display of homemade family movies. Clearly, VTR's were not *especially* made for any infringing purpose.

Second, the manufacturers and distributors of VTR's have no knowledge of the use to which individual purchasers and users will put the product. Without knowing whether or not the user will use the product to copy copyrighted programming and without knowing whether or not the copyright holder consents to the copying, the manufacturers and distributors can at best only speculate as to how VTR's are being used. Without knowing the specific nature of the alleged infringing "combination," the manufacturers and distributors cannot be categorized as contributory infringers under Section 271(c).

Third, as the district court found, the manufacturers and distributors of VTR's could not, and still cannot, because of the uncertain state of the law, know whether the use of the product to copy copyrighted programming is an infringement.[21]

Fourth, in *Aro Manufacturing*, this Court further held that the issue of knowledge is one of fact, and not of law. *Aro*

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[21] *Universal City Studios, Inc. v. Sony Corporation of America, supra*, 480 F. Supp. at 460.

Manufacturing Co. v. Convertible Top Replacement Co., *supra*, 377 U.S. at 491. This gives increased significance to the express finding of the district court herein that the manufacturers and distributors of VTR's have insufficient knowledge of the infringing use of the product and requires that the Court of Appeals' contrary statement be reversed.

These facts, in addition to those discussed above in connection with the knowledge component of the *Gershwin* standard,[22] indicate that the manufacturers and distributors of VTR's do not meet the knowledge requirement of Section 271(c).

C. VTR's Are Staple Articles of Commerce Suitable for Substantial Non-Infringing Use.

The Court of Appeals overruled[23] the district court's conclusion[24] that VTR's are staple articles of commerce "suitable for substantial non-infringing use". This is reversible error.

The determination of whether or not the cited exception to contributory liability applies is one of fact, not law.[25] Factual determinations are reserved to the trier of fact, in this case the district court, and all subsequent review must generally be bound by the trier of fact's findings.[26] In this case, no exception to this rule was invoked by the Court of Appeals.

Moreover, even if the question did involve a legal judgment, the Court of Appeals' conclusion that VTR's are not

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[22]*See supra*, at 6-8.

[23]*Universal City Studios, Inc. v. Sony Corporation of America*, *supra*, 659 F.2d at 975.

[24]*Universal City Studios, Inc. v. Sony Corporation of America*, *supra*, 480 F. Supp. at 461.

[25]*See Charles H. Lilly Co. v. I. F. Laucks, Inc.*, 68 F.2d 175 (9th Cir.), *cert. denied*, 293 U.S. 573 (1933).

[26]Fed. R. Civ. P. 52(a).

staple articles of commerce "suitable for substantial non-infringing use" is clearly wrong.

VTR's are a product which may currently be found in 3 million American homes — obviously a "staple" item.

The uses of VTR's are equally broad — VTR's may be used for copying copyrighted and non-copyrighted television programming, for displaying commercially prepared videotapes, and as a tool for the creation and display of home-made family movies. Each of these uses are "substantial uses" and this lawsuit implicates but a portion of one of them.

Therefore, even without the district court's finding of fact, common sense dictates that the statutory exception applies and precludes the imposition of liability upon the manufacturers and distributors of VTR's for the infringing activitie of home users.

D. Respondents' Lawsuit Herein Is a "Misuse" of Their Copyright Monopoly in That They Seek to Tie a Protected Property (Their Copyrighted Television Programming) to an Unprotected Activity (the Use of VTR's Generally).

As stated above, both the lower courts herein devoted their attention solely to that portion of subsection (c) which exempts the sale of a staple article of commerce "suitable for substantial non-infringing use."

Such a limited treatment of the statute is misleading because the drafters of the patent law, in their wisdom, created a concept which operates to limit or preclude a finding of contributory infringement in certain situations. This concept is known as "patent misuse." *See* 35 U.S.C. §271(d).

Basically, patent misuse consists of an inventor's attempt to link a protected product to an unprotected product by,

for example, tying the purchase of the two products together.[27]

To the extent that it is deemed desirable to analogize copyright law to patent law at least in the area of contributory infringement, it would be advisable not to incorporate that law piecemeal but rather to incorporate it fully.

If, in this case, a concept of "copyright misuse" is applied, respondents should have very little success. Their lawsuit should be viewed as an attempt to link a protected property (their copyrighted television program) to an unprotected activity (the use of VTR's generally) for, by blocking the copying of their copyrighted programming, respondents will effectively preclude the many non-infringing uses of VTR's which require application of the product's record function. Furthermore, even if one could fashion a continuing royalty remedy such as the Court of Appeals has suggested, respondents will reap profits to which they are not entitled under the copyright law at the ultimate expense of the American consumer. This represents an impermissible attempt to extend respondents' copyright monopoly.

Although Section 271(d) expressly provides that the mere filing of a lawsuit to enforce statutory rights is not "patent misuse," the statute does reflect a policy limiting how far the courts should go in protecting the rights of inventors and creators when such protection can only be accomplished at the expense of other important rights. In this case, respondents' rights are outweighed by the rights and interests of the public in preserving the availability of VTR's as currently designed.

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[27]*See, e.g., Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, *reh'g denied*, 448 U.S. 917 (1980).

III.

IN VIEW OF THE ENORMOUS PUBLIC BENEFIT PROVIDED BY VTR'S AND THE NEGLIGIBLE DAMAGE WHICH RESPONDENTS ACKNOWLEDGE HAS BEEN DONE TO THEIR COPYRIGHTS, IT WOULD BE AGAINST PUBLIC POLICY TO HOLD THE MANUFACTURERS AND DISTRIBUTORS OF VTR'S LIABLE AS CONTRIBUTORY INFRINGERS.

If this Court holds that the manufacturers and distributors of VTR's are contributory infringers, the product may very well be taken from the market or its availability and function severely impaired. This result would not be in the best interest of any concerned party, including respondents and the public.

VTR's have created an expanded market for the release of respondents' programming, first, through pre-recorded tapes and, second, through exposure of much of respondents' programming to a new audience of time-shifters, *i.e.*, those persons who record a program for later viewing. In addition to the benefits derived from enhanced exposure alone, respondents will be adequately compensated for the release of their programming into both of these new markets.

Respondents' compensation from the sale of pre-recorded tapes is obvious.

Respondents will be compensated for the new audience of time-shifters through their future licensing arrangements with broadcasters.

Respondents have effectively acknowledged the benefits to them of VTR's by admitting that they have suffered no damage from their use.

In view of the benefits which VTR's have brought to respondents, it is unseemly that they seek through this lawsuit to make even larger profits.

The Court should also consider what the public stands to lose should VTR's be forced from the market or their use restricted.

VTR's may be put to a variety of uses, including the copying of copyrighted and uncopyrighted programming, the display of commercially prepared videotapes, and the creation and display of home-made family movies. In addition to these current uses VTR's hold the promise of even greater and more worthwhile uses in the future.

Beyond the benefits arising from the uses of VTR's, the contribution which they make to our national economy is also noteworthy. VTR's and ancillary products currently comprise a multi-billion dollar industry which is continuing to grow. This Court has stated that it seeks to do nothing which will "block the wheels of commerce,"[28] yet an affirmance in this case would accomplish just that.

Clearly, VTR's provide substantial public benefit.

In view of the extreme imbalance between the negligible damage which VTR's have done to respondents' copyrights and the enormous benefit which VTR's provide to respondents, petitioners, and the public, this Court should preserve the technology and its potential by reversing the Court of Appeals' decision below.

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[28]*Henry v. A. B. Dick Co.*, 224 U.S. 1, 48 (1912), *overruled on other grounds* by *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917).

Conclusion.

For each and all of the foregoing reasons, this Court should reverse the judgment and opinion of the Court of Appeals below.

Dated: August 26, 1982.

Respectfully submitted,

JOHN W. ARMAGOST,
(Counsel of Record),
CRAIG B. JORGENSEN,
ROBERT H. TAKEUCHI,
JOHN K. HART,
STEVEN P. RICE,
Attorneys for Hitachi, Ltd. and Hitachi Sales Corporation of America as Amicus Curiae.

Amicus Brief

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No. 81-1687

IN THE

Supreme Court of the United States

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS.

LEO GEFFNER, a member of
GEFFNER & SATZMAN,
A Professional Corporation,
3055 Wilshire Boulevard,
Suite 900,
Los Angeles, Calif. 90010,
(213) 487-1520,
Attorneys for IATSE as Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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The Brief *amicus curiae* is submitted by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO (hereinafter "IATSE") Consents have been obtained from all the parties, copies of which have been filed with the Clerk of this Court.

Respondents Universal City Studios, Inc. and Walt Disney Productions seek the affirmance of a Judgment and Opinion of the United States Court of Appeal for the Ninth Circuit. IATSE supports their Petition.

Interest of Amicus Curiae.

Whether home-use recording constitutes copyright infringement directly affects this *amicus curiae*. IATSE is an international labor union lawfully representing, pursuant to

collective bargaining agreements, employees of Universal City Studios, Inc., and other motion picture and television producers which produce theatrical motion pictures and/or motion pictures made for television. The interests of IATSE could be catastrophically affected if Appellants prevail.

Employer contributions to IATSE Pension and Health and Welfare Funds are based on monies collected by licensing, to television stations across the country, post-1960's theatrical motion pictures. The Trust Funds receiving these contributions are threatened by drastic reductions if Appellants prevail. Respondents and other motion picture producers could not continue licensing because of the adverse effect home copying would have on potential markets. The theatrical movie rerun market would be seriously diluted since potential licensees and advertisers of those stations would be reluctant to invest in a product which would not be in demand as a result of the proliferation of home copying.

This reduced market for reruns would also cause dramatic unemployment among the members of IATSE since the production of many theatrical motion pictures would have to be curtailed. Many motion pictures are not profitable until they are licensed for television. The production of movies made for television would be similarly reduced because their rerun market would be damaged by viewer ability to copy and reproduce first-run movies appearing on television. The inevitable result of the foregoing would be industry-wide cost cutting, and reduction in production resulting in layoffs of IATSE members as well as other workers throughout the industry.

Summary of Argument.

The Ninth Circuit held that only "productive" uses of copyrighted materials could be fair uses under the Copyright Revision Act of 1976, 17 U.S.C., Section 101, *et seq.*

(1976). This correct holding expresses Congress' express mandate as well as its intent. The Court's opinion is in harmony with other decisions of this Court. The questions concerning fair use decided by the Ninth Circuit were correctly reasoned and in compliance with other decisions. The interests of the public as well as the interests and rights of copyright owners require that this Court affirm the Ninth Circuit's decision.

The public interest issue in this controversy has two sides. The public's "right to copy", if any, must be weighed against the public's "right" to jobs and a secure retirement.

ARGUMENT.

I.

The New Act Does Not Contain a Home Recording Exception.

On its face, the language of the 1976 Copyright Act clearly prohibits home recording of copyrighted motion pictures. The only exceptions from liability are contained in Sections 107 through 118. Each exception is clearly set forth in the 12 sections that follow the broad grant of rights set forth in Section 106. The Ninth Circuit correctly applied the well-settled rule of statutory construction that courts should not disturb what Congress had specifically and unambiguously mandated. The Act contains only those exceptions which diminish the intended broad rights of copyright holders, and the Ninth Circuit correctly assumed its duty "to give faithful meaning to the language Congress adopted in the light of the evident purpose in enacting the law in question." 659 F.2d 963, 966 (1981). (Citations omitted.)

While Section 106(4) is modified to accommodate sound recording by Section 114(a), which exempted off-the-air sound recordings for non-commercial private use, no provision was made for the taping of audio-visual materials. Congress was aware that science had developed videotape recording capability, but no specific exemption for home recording was made, and none should be implied.

The Ninth Circuit did consider the legislative history of the Act, although not required, since Congress spoke clearly and unequivocally in its drafting of the statute. The legislative history Appellants contend supports their position concerns a brief discussion of children's taping of one or two songs off the radio. H. Rep. No. 487, 92nd Cong., 1st Sess. 7. There were opinions expressed that home recording

was not an infringement, but those discussions can hardly be construed as upholding the position that there is some implied home videotaping exception. The drafters were aware of the problem, but chose not to take affirmative statutory action at that time.

There was further discussion of videotaping of news programming by libraries or archives, and Section 108(f)(3) of the Act contains this very limited exception. However, the lawmakers refused to extend this right as far as "documentary . . . magazine-format or other public affairs broadcasts dealing with subjects of general interest to the viewing public." H. Rep. No. 94-1476, 94th Cong., 2d Sess. 77.

This Court, in *Diamond v. Chakrabarty*, 48 U.S.L.W. 4714, had reason to examine statutory construction of a similar nature involving patents. It reaffirmed the principle of closely adhering to the language of a statute:

> "[W]ords will be interpreted as taking their ordinary, contemporary, common meaning. We have also cautioned that *courts should not read into the patent laws limitations and conditions which the legislature has not expressed.*" *Id.*, at 4715. (Citations omitted, emphasis added).

In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), this Court considered whether an implied hardship exception for a federal agency was contained in the Endangered Species Act of 1973. In finding no implied exception, it reasoned that the only hardship cases were those which Congress had intended to exempt in its drafting of the Act. The copyright statute in question is surely as carefully drafted as the Endangered Species Act. The Ninth Circuit applied the standards of *Diamond* and *TVA v. Hill* by refusing to find any implied exception for home video recordings.

II.

The Fair Use Defense Never Protected Complete or Entire Copying.

Section 107 of the Act identifies four factors courts are to consider in determining whether a use is fair: the nature of the copied work, the purpose of the copying, the substantiality of the copying, and the effect of the copying on the potential market for the work. Traditionally, fair use has been a defense where the use of the primary work has been incorporated into a secondary work. However, mere reproduction of a work intended for the same use as that of the original was not intended as fair use. Fair use has not been and never was intended to protect mass copying of a protected work.

The Ninth Circuit clarified the application of the doctrine of fair use by eliminating the "loophole" which threatened to undermine all copyright holders by refusing to hold "ordinary and intrinsic" use as within the boundary of fair use. As the Court noted, fair use should be the productive use of a primary work—a use which furthers research, criticism, or education. Neither convenience nor entertainment is a productive use, and the Court so held.

The Ninth Circuit followed established case law in reaching the decision that home videotaping was infringement and not protected by the doctrine of fair use. However, the Court continued the analysis by examining its four elements. Of prime interest to IATSE is the fourth element—the effect on the potential market.

As one commentator noted, materials copied by videotape recorders do more harm than copying of materials which are purely sound:

> "The pirating user of a motion picture . . . appropriates not merely the plot and dialog, but also the best and

> only production containing the services of artists and actors otherwise unavailable, [and] can give unlimited identical performances in any place for any gathering, which compete with and destroy the value of the work for the copyright owner and his legitimate exhibition licensees."
>
> "Disc-Television": Some Recurring Copyright Problems in the Reproduction and Performance of Motion Pictures, 34 University of Chicago Law Review 666, 694-99 (1967).

Respondents will be forced to compete with their own products if mass copying is allowed. Furthermore, IATSE is concerned that when millions of videotape recorder owners copy movies and other first-run and copyrighted features, the marketplace will be so diminished by disinterest that their primary fears will be realized—production curtailment. Since the Pension Trust Funds are financed by a percentage of the licensing fees movie theaters and television stations pay, IATSE is concerned that retirement plans will be jeopardized. If the Act is interpreted to allow this indiscriminate copying, members of IATSE and other entertainment industry employees will view the practice as taking bread from their tables.

Mounting production costs have steadily reduced the number of new releases. For many production companies, the rerun market was the break-even point. If mass taping results in a diluted marketplace for these films, motion picture producers will be reluctant to fund new films. The inevitable result will be massive layoffs in the entertainment industry. In addition, future contributions to the IATSE Pension Trust Fund will be further reduced. The public interest issue in this controversy has two sides. The public's "right to copy", if any, must be weighed against the public's "right" to jobs and a secure retirement.

Conclusion.

The Ninth Circuit's decision is correct and is in harmony with the decisions of all other courts in considering the issue of fair use regarding home video recording. It has expressly and clearly interpreted the provisions of the 1976 Copyright Act. Furthermore, isolated quotations from the legislative history of the Act are not determinative where the language of the statute is clear. In that the Ninth Circuit's holding will serve the public interest of protecting employment in the entertainment industry and protecting the IATSE Pension Trust Fund, IATSE respectfully urges this Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Dated: October 27, 1982.

Respectfully submitted,

LEO GEFFNER, a member of
GEFFNER & SATZMAN,
A Professional Corporation,
Attorneys for IATSE as
Amicus Curiae.

Amicus Brief

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In The

Supreme Court of the United States

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Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. AND WALT DISNEY PRODUCTIONS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF McCANN-ERICKSON, INC., BATTEN, BARTON, DURSTINE & OSBORN, INC., BACKER & SPIELVOGEL, INC., WARING & LAROSA, INC., AND AMMIRATI & PURIS INC., *AMICI CURIAE*

JOHN A. DONOVAN
(Counsel of Record)
A. HOWARD MATZ
JOHN J. KRALIK IV
HUGHES HUBBARD & REED
555 South Flower Street
Los Angeles, California 90071
(213) 489-5140
Attorneys for Amici Curiae
McCANN-ERICKSON, INC.,
BATTEN, BARTON, DURSTINE,
& OSBORN, INC.,
BACKER & SPIELVOGEL, INC.,
WARING & LAROSA, INC., and
AMMIRATI & PURIS INC.

Of Counsel:
LEO A. EGAN
BARRY J. WAGNER
PHILIP S. REISS
DAVID FLEISCHER
RAYMOND W. MERRITT

August 25, 1982

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This brief is submitted with the written consent of all parties, which is on file with the Clerk of this Court.

McCann-Erickson, Inc. ("McCann"), Batten, Barton, Durstine & Osborn, Inc. ("BBDO"), Backer & Spielvogel, Inc. ("Backer"), Waring & LaRosa, Inc. ("Waring"), and Ammirati & Puris Inc. ("Ammirati"), as amici curiae, respectfully pray that this Court reverse the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

INTEREST OF THE AMICI CURIAE

McCann, BBDO, Backer, Waring and Ammirati are advertising agencies (collectively, the "agency amici"). McCann served as the national advertising agency for the Betamax, succeeding Defendant Doyle Dane Bernbach,

Inc. ("DDBI")[1] on the Betamax account. McCann currently serves as the national agency for other Sony products. In addition, McCann was the advertising agency for Hitachi Sales Corporation of America, which also markets videotape recorders ("VTRs") and related items including videotape cassettes. Backer has succeeded McCann on the Betamax account. It also handles the national advertising for the Betamax SL 2000 model, which has a portable recorder that (like a home movie camera) can tape non-broadcast material, such as family celebrations. Waring prepares the advertising for videotape used on VTRs. Ammirati handles the advertising for Betamax equipment used for commercial and educational purposes. BBDO does not serve as the advertising agency for any Sony products, but it is the agency for the General Electric VTR and related equipment.

In its opinion, the Ninth Circuit did not discuss the role of the defendant advertising agency, DDBI, in the alleged infringement by home users of the Betamax. Instead, the Ninth Circuit simply lumped DDBI in with the other "corporate appellees" that it found to be "sufficiently engaged" in the infringement. Pet. App. at 27.[2] As a result, advertising agencies now face the specter of strict liability for acts performed by the purchasers of their clients' products. The agency amici submit that the Ninth Circuit erred in both the ruling it made and the broad scope in which it was rather cavalierly applied.

The specter of this enormous contributory infringement liability soon came even closer to reality. Within weeks of the Ninth Circuit's opinion, respondent Universal sued McCann, BBDO and 13 other advertising

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1. For the sake of clarity, in this brief the agency amici will adopt the abbreviations utilized in Sony's petition.

2. References to the opinions below will be to the Petitioners' Appendix, cited as "Pet. App. at ..... ."

agencies for copyright infringement. *Universal City Studios, Inc. v. RCA Corp.*, No. 81-5723-FW (C.D. Cal., *filed* Nov. 6, 1981). That complaint accuses the agencies of having

> "published and . . . broadcast . . . advertisements and brochures . . . for the purpose of selling one or more brands of the VTR's and video-cassettes . . . for use by members of the public in making recordings and copies of [materials] owned and copyrighted by plaintiff."

The agency amici also believe that the Ninth Circuit's contributory infringement rule will have a chilling effect upon the conduct of their business. In the highly competitive advertising industry, agencies must seek new clients and promote newly developed products such as the Betamax. Faced with open-ended liability under the Ninth Circuit's rule, agencies will shun the many new products that carry the risk of this new secondary strict liability.

SUMMARY OF ARGUMENT

The advertising agencies present three arguments for reversal of the Ninth Circuit's erroneous rulings on infringement and contributory infringement:

1. The legislative history of the Copyright Act of 1976, 17 U.S.C. §§ 101-810 (the "New Act"), makes clear that home-use videotape recording is non-infringing conduct within the ambit of the "fair use" doctrine developed under the prior copyright statute and continued under the New Act. The Ninth Circuit erroneously reached a contrary conclusion because it reviewed the legislative history solely in search of an express exemption for home-use recording, which was unnecessary, and it failed to consider the pertinent legislative history in connection with the fair-use doctrine, the context in which that history was applicable. The Ninth Circuit also improperly disregarded the legislative history of The Sound Recording Act

of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (hereinafter the "1971 Amendment"), for that Act was an integral part of the overall revision process. Finally, the Ninth Circuit did not give proper weight to legislative materials traditionally utilized by this Court.

2. The Ninth Circuit has vastly extended the scope of contributory infringement liability. Without considering the role of the advertising agency in any supposed infringement, the Ninth Circuit found the agency strictly liable because it was "sufficiently" involved. This decision is erroneous, for it adopts a quantitative approach to contributory infringement that this Court disapproved in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 396-98 (1968). This Court should also limit contributory infringement by applying the staple-item-of-commerce exception to contributory infringement under which only manufacturers of items used "solely" for infringement are liable for contributory infringement. *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 213 (1980) (contributory patent infringement).

3. Without weighing the constitutional implications, the Ninth Circuit has adopted an overly inclusive rule of contributory infringement which will have a chilling effect upon commercial speech and upon invention. It has imposed liability on an advertising agency for merely being associated with the marketing of a product capable of both infringing and non-infringing use, even though the agency could not prevent the infringing use and the advertising did not induce the infringing conduct. Such an open-ended rule can only make agencies reluctant to undertake the advertising of such products and inhibit the creators of such products from fully exploiting their inventions.

ARGUMENT

I.

THE NINTH CIRCUIT ERRONEOUSLY FAILED TO CREDIT THE LEGISLATIVE HISTORY SHOWING THAT CONGRESS VIEWED HOME-USE RECORDING AS NON-INFRINGING FAIR USE

The Ninth Circuit analyzed the legislative history of the New Act out of context, failing to recognize that Congress viewed home-use videotape recording as non-infringing conduct within the "fair use" doctrine developed by the courts under the Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909) (the "1909 Act"), and continued under the New Act.

A. Legislative History Of The New Act Shows That Home Use Was Fair Use.

When Congress passed the New Act on October 19, 1976, it brought to fruition 20 years of legislative effort.[3] The record of this effort shows a consistent intention that home use of copyrighted works not be within the prohibitions of the new statute.

The revision process began when the Legislative Appropriations Act of 1955 set aside funds for a series of studies[4] and hearings directed toward a new copyright act. 1976 House Report at 47. In 1961, after the copyright office had conducted these hearings and studies, the Register of

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3. The legislative history of this effort is recounted in the Congressional committee reports on the bill: H. R. Rep. No. 1476, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659 (the "1976 House Report"); S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975) (the "1975 Senate Report"); Conference Report on the General Revision of the Copyright Law, No. 94-1733, 94th Cong., 2d Sess. (1976) (the "Conference Report").

4. These studies were published by the Subcommittee on Patents, Trademarks and Copyright of the Senate Judiciary Committee (the "Senate Subcommittee"), chaired by Senator McClellan. Studies Prepared for the Subcommittee on Patents, Trademarks and Copyrights of the Committee of the Judiciary of the United States Senate, 86th Cong., 1st & 2d Sess. (Comm. Prints 1960-61).

Copyrights, Abraham L. Kaminstein, issued a report to Congress that accurately predicted the development of the Betamax and opined that its home use would not be infringement.

> "New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright." (Register of Copyrights, 87th Cong., 1st Sess., Report on the General Revision of the U.S. Copyright Law 30 (Comm. Print 1961) (the "1961 Report").)

The Register reached this conclusion in connection with his rejection of a proposal by the Motion Picture Association of America, Inc. ("MMPA") that the new law prohibit unauthorized private performances of motion pictures. In the 1961 Report, the Register recommended that the performance right be limited to public performances. He took the position that performances in the home — even of bootleg films — should not be infringement of copyright. 1961 Report at 29-30. *See* Appendix A. As shown below, the motion picture industry fought this conclusion, but, in 1965, with knowledge of the advent of the Sony videorecorder, finally acquiesced in it.

Between 1961 and 1964, the Copyright Office conducted numerous meetings concerning the proposed new act.[5] On March 2, 1962, as part of these proceedings, the MMPA's Copyright Committee submitted a memorandum opposing the conclusion of the Register's 1961 Report that home exhibition of motion pictures recorded off the air could not and should not be precluded by the new act. Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright

5. The Government printing office printed the record of these proceedings for use by the House Judiciary Committee. The volumes are entitled "Copyright Law Revision."

Law, 88th Cong., 1st Sess., 347-350 (Comm. Print 1963) (portions reprinted in Appendix B). Subsequent events show that neither the Register nor Congress accepted the MMPA's position.

The initial work of the Copyright Office bore fruit in July 1964. Toward the end of the 88th Congress, the first bill for general revision of the 1909 act was introduced in the House and Senate by their respective committees on the Judiciary. H. R. 11947 and S. 3008, 88th Cong., 2d Sess. (1964). The 1964 bill proposed for the first time copyright protection for sound recordings. (Owners of motion pictures already possessed such protection under the 1909 Act.) Subject to certain exceptions, owners of copyrights in protected works, including sound recordings and motion pictures, were given the exclusive right to reproduce them, subject to statutory exceptions including fair use. See Copyright Law Revision, Part 5, 1964 Revision Bill with Comments, 89th Cong., 1st Sess. 2 (Comm. Print 1965) ("Copyright Revision Part 5").

The 1964 Bill also contained the Register's previous proposal, unchanged by the objections of the motion picture industry, that the exclusive performance right did not preclude home performances, even performances of unauthorized recordings. *Id.* at 4. This provision would remain unchanged in all subsequent versions of the general revision bill, and would become § 106(4) of the New Act. The MMPA's Copyright Committee acquiesced in this provision in a memorandum dated January 26, 1965. Copyright Revision Part 5 at 302-03. *See* Appendix C.

The legislative history shows that, even in 1965, both the motion picture industry, including the respondents, and the Register were aware that home video recorders would soon be available to the public. Thus, the Register's 1965 Report, which accompanied the 1965 version of the general revision bill, H.R. 4347 and S. 1006, 89th Cong., 1st Sess. (1965), acknowledged "the imminent

development of home video tape recordings." Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1965 Revision Bill, 89th Cong., 1st Sess. 47 (Comm. Print 1965) (the "1965 Report"). *See* Appendix D. Likewise, in June 1965, Adolph Schimel, Vice President and General Counsel of Universal's predecessor in interest, appeared before the House Judiciary Committee as Chairman of the Law Committee of the MMPA[6] to oppose permitting broadcast stations to make archival recordings of audio-visual works. Mr. Schimel presented to the committee a statement of the MMPA's Copyright Committee, signed by its counsel, Edward A. Sargoy, opposing archival recordings. This statement showed full awareness that Sony was about to place a videotape recorder on the consumer market at an affordable price, yet it did not assert that recording by such devices could or should be infringement:

> "It is true that performing rights may not pass with the transfer of physical possession of these archival copies, but it is small comfort to the motion picture industry to have such copies possibly get into the bootleg market, for performances as to which the possibility of discovery will be remote.
>
> "It is even less comfort for the Register to tell us in the 1965 Supplementary Report (p. 47) that we have seen nothing yet as to film bootlegging; that home video tape recordings are an imminent development. The New York Times for June 9, 1965 confirms that in a few weeks Sony Corporation will be selling for $995 a Videocorder which is a portable home video recorder." (*Hearings before Subcommittee No. 3 of the House Judiciary Committee on H.R. 4347, H.R. 5680, H.R.*

6. This committee was composed of the general counsels for the principal member companies of the MMPA.

6831 and H.R. 6835, 89th Cong., 1st Sess., ser. 8, pt. 2, 1033 (June 16, 1965).)

Spencer C. Olin, a vice president and general attorney of Respondent Disney, fully adopted this statement when he testified at the same hearings. Mr. Olin stated:

> "We are fully in accord with and adopt:
>
> "The statement filed on June 16, 1965, in behalf of the member companies of the Motion Picture Association of America, particularly the statements of Mr. Schimel and Mr. Edward Sargoy." *(Id.* pt. 3, at 1545.)

Subsequent to these 1965 statements by the MMPA, the legislative history shows that, despite the knowledge that home videotape recorders were now available to the public, the motion picture industry, the Register and Congress accepted (1) that private home performance of copyrighted works, whether audio or visual, would not be infringement, and (2) that the home tape recording that preceded such a performance, whether audio or visual, would be fair use under the continuation of that doctrine in the New Act.

Both Houses held hearings on the 1965 bills submitted by the Copyright office, the Senate hearings continuing into 1966. The House Judiciary Committee reported the House bill on October 12, 1966, H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966), but the 89th Congress was adjourned before the House could act on the Bill. In January 1967, the same general revision bill was again introduced in both Houses. H.R. 2512 and S. 597, 90th Cong., 1st Sess. (1967). The House Judiciary Committee reported the House bill in March of 1967, H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967), and it was passed by the House of Representatives with several amendments. The Senate Judiciary Committee, however, did not complete action on the general revision, principally because of the emergence of problems regarding cable television that were to slow the general revision process for nearly ten years. *See* 1976 House Report at 48.

Thereafter, almost yearly through 1971, bills for the general revision of the copyright law were introduced in the Senate. These, like all those preceding them, conferred the same basic grant of the exclusive right to reproduce (subject to specified exemptions including fair use) on copyright owners of motion pictures, music and sound recordings. These bills did not pass, again primarily because of issues raised by the cable television industry and the Federal Communications Commission's consideration of new cable television rules. *See* 1976 House Report at 48. *See also* H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 3 (1971) (the "1971 House Report").

In 1971, at the opening of the 92d Congress, Senator McClellan introduced in the Senate a bill for the general revision of the copyright law, S. 644, 92d Cong., 1st Sess. (1971), which provided copyright owners the same broad exclusive right to reproduce as had been in the prior general revision bills, subject to certain exemptions including fair use. At the same time, Senator McClellan introduced a separate bill, S. 646, 92d Cong., 1st Sess. (1971). The separate bill was a splinter taken from the general revision bill. It granted copyrights to owners of sound recordings made after February 15, 1972, and provided, among other things, that owners of sound recording copyrights would have the same exclusive rights to reproduce that had been granted to other holders of copyrights under the 1909 Act. As Senator McClellan said during debate on the measure, he introduced this bill because record piracy had reached epidemic proportions that required immediate action:

> "The recent rapid increase in the unauthorized commercial duplication of legitimate recordings has become a serious problem . . . in this country . . . .
>
> ". . . By granting a limited copyright on sound recordings, this legislation will make a major contribution

to the suppression of this unethical and unfair business competition." (117 Cong. Rec. 12763 (April 29, 1971).)

While the general revision bill remained stalled, the Senate passed Senator McClellan's splinter bill on April 29, 1971. The House conducted hearings on a companion bill, H.R. 6927, 92d Cong., 1st Sess. (1971), in June 1971 and passed it in October 1971. *See* 1976 House Report at 48-49; 1971 House Report at 3. Ranking members of the House Judiciary Committee confirmed Senator McClellan's statements of the bill's purpose during the House debate. *See* Appendix E. This act, the Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391 (the "1971 Amendment"), added subsection (f) to Section 1 of the 1909 Act and subsection (n) to Section 5 of that act. *See* Appendix F.

The legislative history of the 1971 Amendment is simply part of the general revision process leading to the New Act. As stated by the Chairman of the House Judiciary Committee:

"[N]either the limited copyright for sound recordings nor the increase in remedies for owners of musical compositions is a new expedient. Both have been approved by our committee and passed by the House as part of . . . the copyright law revision bill of 1967, and both would almost certainly have been enacted into law ere now, had that not been held up pending Senate action on the revision." *(Hearings on S. 646 and H.R. 6927 before Subcommittee No. 3 of the House Judiciary Committee,* 92d Cong., 1st Sess. 5 (1971) ("1971 Hearings").)

That Congress intended that the 1971 Amendment would eventually be reincorporated into the general statute is evident in a letter dated January 19, 1971, from the Librarian of Congress to the Chairman of the Senate Judiciary Committee:

"In general, we also support the amendatory language adopted in the bill *which draws heavily upon*

the language of the bill for general revision of the copyright law . . . .

"The most fundamental question raised by the bill is its relationship to the program for general revision of the copyright law. The revision bill before your committee this past session and which Senator McClellan proposes to reintroduce, has parallel provisions, and if general revision were on the threshold of enactment [the 1971 Amendment] would be unnecessary. However, some fundamental problems impeding the progress of general revision of the copyright law, notably the issue of cable television, have not yet been resolved. We agree that the national and international problem of record piracy is too urgent to await comprehensive action on copyright law revision, and that the amendments proposed in [the 1971 Amendment] are badly needed now. *Upon enactment of the revision bill, they would, of course, be merged into the larger pattern of the revised statute as a whole.*" Senate Report No. 92-72, 92d Cong., 1st Sess. 7-8 (1971) (emphasis added) (the "1971 Senate Report").

The Librarian of Congress reiterated these statements to the House Judiciary Committee. *See* Appendix G. The 1971 House Report also shows that this amendment was part of the general revision process. 1971 House Report at 3-4. *See* Appendix H.

During Senate debate on the 1971 Amendment, Senator Hart (D. Mich.) questioned whether the broad language of the bill would do more than simply prevent commercial record piracy:

"The reach of the proposed bill is vague even if authorship is located . . . . The committee report does not define the reach of this grant of exclusivity to reproduce and distribute. How much further the right extends beyond exclusion of a 'pirate' to reproduce an exact copy on a disc or tape is not clear. *In a field of rapid technological change we should be*

careful not to erect barriers to the evolution of technology." (117 Cong. Rec. 12764 (emphasis added).)

Representative Edward Beister, whose son recorded his favorite songs off the radio, also worried about the broad reach of the 1971 Amendment. During the June 1971 hearings of the House Judiciary Committee he closely questioned Ms. Barbara Ringer, then Assistant Register of Copyrights,[7] to be sure he was not enacting a law that would expose his son to liability. Ms. Ringer assured him that the bill was not intended to reach home recordings, reiterating the views expressed in the Register's 1961 Report, which she helped write.

> "MR. BEISTER: . . . I can tell you I must have a small pirate in my own home.
>
> "My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set.
>
> "Now, he may retrieve in addition something else onto his recording, but nonetheless, he does retrieve the basic sound, and this legislation, of course, would not point to his activities, would it?
>
> "MISS RINGER: I think the answer is clearly, 'No, it would not.' " (1971 Hearings 22.)

Ms. Ringer then went on to discuss home *video* recording:

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7. Ms. Ringer became the Register of Copyrights later in 1971. She had played an important role in the revision process since its beginning, as Register Kaminstein acknowledged in his 1965 Report.

> "In the last 5 years my colleagues on the Copyright Office General Revision Steering Committee, now including . . . Abe A. Goldman, General Counsel, Barbara A. Ringer, Assistant Register of Copyrights for Examining . . . , have spent endless hours on revision . . . . The very difficult task of putting precisely what we had in mind into words, both in the *Report* of 1961 and the *Supplementary Report* of 1965, has fallen to the gifted pens of Barbara Ringer and Abe Goldman." (1965 Report at viii.)

"I have spoken at a couple of seminars on *video* cassettes lately, and this question is usually asked: 'What about the home recorders?'

"The answer I have given and will give again is that this is something you cannot control.

"You simply cannot control it."

" . . . *I do not see anybody going into anybody's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping.*

"MR. BEISTER: Secondly, with respect to video cassettes, are we approaching an additional problem, not with respect to private use, but with respect to public distribution after it has been retrieved over a home set?

"MISS RINGER: The answer is very definitely, 'yes.'

"For years the motion picture industry has been faced with bootlegging problems, much of it deriving from the 16 mm. prints that were distributed to the Armed Forces and got out of control. The film industry has had a very active policing activity for years.

"I think that this problem is going to undergo a quantum increase when video cassette recorders are freely available. But I would say that there is a big difference, and I think it is something that you might consider. In that area, they have got copyright protection, and in this area, who knows? *It is certainly not protectable under the Federal statute.*" (Id. at 22-23 (emphasis added).)

The witness following Ms. Ringer at the same hearings was Stanley M. Gortikov, President of the Recording Industry Association of America, Inc., who agreed that home recording was outside the scope of the proposed act.

"The pirate also argues that granting a copyright may raise questions about the individual who in his home may duplicate a commercial performance on *home-recording equipment.* We in the industry certainly have known that such amateur practices go on in the home, and *we realistically recognize that no such enforcement is possible, and certainly none is intended."* (*Id.* at 26 (emphasis added).)[8]

It was in this context then, that the final House Report on the 1971 Amendment declared that Congress did not intend home use taping to be infringement. That report made it clear that owners of the new sound recording copyright were getting protection no broader than other copyright holders, such as motion picture owners, already had.

"Home Recording.

"In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing Title 17. Specifically, *it is not the intention of the Committee to restrain the home recording, from broadcasts* or from tapes or records, *of recorded performances,* where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright

8. Mr. Gortikov and his trade association recently reversed their position when the Ninth Circuit ignored his previous statements and, by its unwarranted expansion of the contributory infringement doctrine, presented the recording industry with an appealing opportunity to focus its attack on the manufacturers, retailers and advertisers of recording equipment. *See Statement of the Recording Industry Association of America, Inc. Before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice (April 14, 1982).*

> in recorded musical compositions over the past 20 years." (1971 House Report at 7 (emphasis added).)

In other words, motion picture owners did not have, and sound recording owners were not getting, the right to restrain home recording for private use.

Just prior to the passage of the 1971 Amendment, Representative Kastenmeier, the Chairman of the House Judiciary Committee, explained the House Report on the Amendment to Representative Kazen (D. Tex.), another Congressman worried that the exclusive right to reproduce contained in the bill might prohibit home recordings.

> "MR. KAZEN: Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?
>
> "MR. KASTENMEIER: Yes.
>
> "MR. KAZEN: In other words, if your child were to record off a program which comes through the air on the radio or *television*, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?
>
> "MR. KASTENMEIER: This is not included in the bill. I am glad the gentleman raises the point.
>
> "On page 7 of the report, under 'Home Recordings,' Members will note that under the bill the same practice which prevails today is called for, namely, *this is considered both presently and under the proposed law to be fair use.* The child does not do this for commercial purposes. This is made clear in the report." (117 Cong. Rec. 34748-49 (Oct. 4, 1971) (emphasis added).)

Thus Representative Kastenmeier clarified the consistent legislative intent that home use, whether audio or video, was fair use.

Bills for the general revison of the copyright law were introduced in the 93d (1973-74) and 94th (1975-76) Congresses.[9] Each of these bills like those preceding them, contained the same basic grant of an exclusive right to reproduce, subject to exceptions including fair use. In 1975, in the 94th Congress, the Senate and House Judiciary Subcommittees introduced bills in their respective houses for the general revision of the copyright law. Senator McClellan, who was chairman of the Senate Committee in charge of the general revision of the copyright law from 1961 to 1976, introduced and reported the Senate bill (S. 22, 94th Cong., 1st Sess. (1976); 1975 Senate Report). Representative Kastenmeier, who had been part of the House Committee since 1961 and was chairman thereof from 1969 to 1976, introduced the House bill and the Judiciary Committee Report on the House bill (H.R. 2223, 94th Cong., 1st Sess. (1975); 1976 House Report). Senator McClellan and Representative Kastenmeier also were members of the Conference Committee which put the New Act into final form, and each of them submitted the Conference Report to his branch of the Congress.

Barbara Ringer, now Register of Copyrights, testified at the hearings on the House bill and submitted the comments of the Copyright Office in writing. *See* Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (1975) (the "Register's 1975 Report"). However, the purpose of the Register's "supplementary" 1975 Report was only "to identify what I considered the main issues remaining

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9 The 1971 Amendment carried an expiration date of December 31, 1974 on the assumption that, by that date, a general revision bill would have been enacted covering the same material. When it became apparent by fall of 1974 that the general revision bill remained stalled, Congress passed, and the President signed on December 31, 1974, a bill which, in effect, established the 1971 Amendment on a permanent basis until passage of the New Act. Act of December 31, 1974, Pub. L. No. 93-573, 88 Stat. 1873. The discussion of this law once again emphasized that the evil to be combatted was commercial piracy. H.R. Rep. No. 93-1581, 93d Cong., 2d Sess. 4 (1974).

after a decade of sporadic legislative considerations of the general revision bill . . . ." Since the public's right to record programs off the air had been resolved during the hearings on the 1971 Amendment, the Register's 1975 Report did not discuss it. Neither did the 1976 House Report or the 1975 Senate Report.

The New Act was finally signed into law on October 19, 1976. As contemplated by Congress in 1971, the provisions of the 1971 Amendment were reincorporated into the act as a whole.[10] *See* Appendix I.

Thus, the legislative history shows that Congress, in granting "the exclusive right . . . to reproduce" to copyright owners in the 1971 Amendment, which became subsection (f) of Section 1 of the 1909 Act, did not intend thereby to bar home recordings off the air in the home for private use. The substantive identity in language of the 1971 Amendment and of the New Act, including versions from before and after the 1971 Amendment, shows that the expressed purpose of the 1971 Amendment to exclude control by the copyright owner over home recordings was still the purpose of the New Act. The Registers and Representative Kastenmeier stated that the practice of home recording of broadcast works for private non-commercial use was not to be proscribed, for it had been fair use under the 1909 Act and would continue to be fair use under the proposed New Act. If those sponsors of the 1971 Amendment, who were also primarily responsible for enactment of the New Act, had changed their intentions on the subject between 1971 and 1976, they would

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10. The Copyright Office recognized this reincorporation:

> "The new law retains the provisions added to the present copyright law in 1972, which accords protection against unauthorized duplication of sound recordings.

Circular R-99, "Highlights of the New Copyright Law," (1977), *reprinted in* 1 Copyright Law Reporter (CCH) ¶ 15,495 (1980).

have so indicated. They did not. Instead, they left standing their many previous statements that both audio and video home use recording were fair use.

B. The Ninth Circuit Erroneously Failed To Review The Legislative History Of The New Act.

Defendants proved to the district court's satisfaction that home-use videotape recording is non-infringing conduct within the "fair use" doctrine as it was developed by the courts under the 1909 Act and the New Act. The Ninth Circuit reached the contrary conclusion, but its analysis was fatally flawed by its failure to credit the legislative history of the New Act which made clear that Congress viewed home-use videotape recording as fair use. Thus misdirected, the Ninth Circuit relied heavily upon the absence of an express statutory exception for home use, which was unnecessary, and failed to recognize the common thread running through the 20-year legislative history of the New Act.

The Ninth Circuit tested the legislative history against the proposition that there was an implied statutory exemption "*apart from the fair use doctrine*," Pet. App. at 11 n.8 (the court's emphasis) and not surprisingly vanquished this straw-man proposition. Pet. App. at 11-12. Then, when it considered the fair-use doctrine, the Ninth Circuit totally ignored the pertinent legislative history. It concluded that home-use recording did not fall within the statutory continuation of this doctrine, 17 U.S.C. § 107, without ever connecting section 107 to the statements in the legislative history which applied the doctrine to home-use recording. *See* Pet. App. at 12-25.

In its consideration of the interplay between the statutory language and the legislative history relied upon by the district court, the Ninth Circuit applied three

maxims of statutory construction.[11] First, it applied *expressio unius est exclusio alterius* in ruling that the express exceptions in sections 107-118 of the New Act are exclusive, thereby precluding an implied exception for home-use recording. Pet. App. at 4-12. This approach fails to appreciate that no separate exception is necessary because the New Act expressly continued the doctrine of fair use in 17 U.S.C. § 107, which covers home-use recordings.[12] Since there is a statutory exception covering home use, the maxim is inapplicable. As the court in *Encyclopedia Brittanica Education Corp. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978), put it:

> "The legislative history . . . makes clear that the statutory exemptions were intended to supplement rather than supersede the doctrine of fair use . . . Therefore, one cannot infer that a use is prohibited merely because it was not exempted by the statute." (*Id.* at 249 n.7.)

Moreover, the Ninth Circuit's maxim proves too much. Were it as categorical as that court believed, it would have precluded the original development of the doctrine of fair use, not just the subsequent specific application of that doctrine to home-use taping of sound recordings. Thus, on its face the 1909 Act granted copyright holders a complete monopoly "to print, reprint, publish, copy and vend the

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11. It was erroneous in and of itself to apply the maxims rather than credit the legislative history before the court. As this Court has repeatedly held, maxims of statutory construction serve "only as an aid in discovering the legislative intent when that is not otherwise manifest," *United States v. Barnes*, 222 U.S. 513, 519 (1912), and they "must yield to clear contrary evidence of legislative intent." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). *Accord, Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940).

12. A major function of the fair-use doctrine has been to provide a flexible tool for adapting the statutory scheme of copyright protection to technological innovations such as the VTR. This function was singled out by Congress when it continued the doctrine under the 1976 Act, as follows: "[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. . . . [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis." 1976 House Report at 66.

copyrighted work." 1909 Act § 1(a). Notwithstanding this absolute language, the courts developed the doctrine of fair use which, in the Ninth Circuit's own words, was designed "to immunize some forms of copying from the literal implications of the [1909] Act." Pet. App. at 5. Moreover, the 1971 Amendment contained a similar, apparently "exclusive" right to "reproduce" sound recordings. Nevertheless, as shown *supra*, pp. 13-16, Congress believed that the fair-use doctrine exempted home audio recordings from the provisions of that statute.

The second maxim on which the Ninth Circuit relied was that "[r]esort to the legislative history of an Act is entirely unnecessary when the statute is clear and unequivocal on its face." Pet. App. at 12. This Court has repeatedly held that such perceived clarity cannot justify a refusal to examine the legislative history. *Train v. Colorado Public Research Group*, 426 U.S. 1, 9-10 (1976) (exclusion of legislative history held clearly erroneous, even though the statute appeared unambiguous on its face); *see United States v. Clark*, 50 U.S.L.W. 4128, 4129 (U.S. Jan. 12, 1982). In any event, this maxim is inapplicable because the legislative history in question relates to the fair-use exception, a provision which the Ninth Circuit certainly does not view as clear and unambiguous. *See* Pet. App. at 14.

Finally, opining that "[t]here is absolutely nothing in the 1971 legislation which would indicate that the Congress was in any way concerning itself with home video recording," the Ninth Circuit found no basis for a home-use exemption since "silence cannot be viewed as an expression of Congressional intent." Pet. App. at 12. As shown above, Congress did not remain silent on the specific subject of home video recording. Beyond that, the maxim is in any event inapplicable because Congress made express provision for fair use in section 107 of the New Act, and the legislative history demonstrates that Congress viewed home recording as falling within that doctrine.

C. The Ninth Circuit Erroneously Excluded Legislative History Of The 1971 Amendment.

To the extent that the Ninth Circuit gave any consideration to the legislative history, it clearly missed its thrust. It chose to view the 1971 Amendment as an isolated occurrence and "entirely beside the point," Pet. App. at 11, rather than as an integral part of a 20-year continuum of legislative work on a general revision of the copyright laws. Properly viewed in the latter perspective, it is apparent that the legislative history of the 1971 Amendment is relevant. The home-use exception for sound recordings contained in that history is a concrete application of Congress' more general view that home use falls within the doctrine of fair use.

Where, as here, the passage of a statute is the culmination of a prolonged period of legislative consideration of a succession of bills on the same subject matter, it is entirely appropriate to interpret the final product in light of the full history of the legislative process which produced it. This Court emphasized this principle in *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980), where it construed statutes governing contributory infringement of patents:

> "Although the final version of the statute reflects some minor changes from earlier drafts, the essence of the legislation remained constant. References were made in the later hearings to testimony in the earlier ones. Accordingly, we regard each set of hearings as relevant to a full understanding of the final legislative product." (*Id.* at 204.)

Accord, Baldridge v. Shapiro, 50 U.S.L.W. 4227, 4230 n.10 (U.S. Feb. 24, 1982) (statutory interpretation based on 18 years of legislative history leading to the Freedom of Information Act); *TVA v. Hill*, 437 U.S. 153, 178 (1978); *United States v. Enmons*, 410 U.S. 396, 405 n.14 (1973).

D. The Statements Showing That Home Use Is Fair Use Are Contained In Proper Legislative Materials.

Finally, the Ninth Circuit denigrated the statements of Ms. Ringer and Rep. Kastenmeier, calling them "extemporaneous" and not "a considered review of the home videorecording problem," Pet. App. at 11 and n.8. By doing so, the Ninth Circuit unfairly excluded the type of reliable materials traditionally referred to by this Court in the search for legislative intent.

Under this Court's decisions, the views of the Copyright Office, expressed by Registers Kaminstein and Ringer, must be given "great weight" rather than the short shrift accorded them by the Ninth Circuit. As this Court stated recently: "We necessarily attach 'great weight' to agency representations to Congress when the administrators 'participated in drafting and directly made known their views to Congress in committee hearings.' " *United States v. Vogel Fertilizer Co.*, 50 U.S.L.W. 4137, 4142 (U.S. Jan. 13, 1982). *Accord, Zuber v. Allen*, 396 U.S. 168, 192 (1969). *See also Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961); *United States v. Union Oil Co.*, 549 F.2d 1271, 1279 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977).

Likewise, this Court has held that statements by committee chairmen and sponsors of bills are entitled to great weight. *See Simpson v. United States*, 435 U.S. 6, 13 (1978). The statements by Chairman Kastenmeier during hearings (*e.g.*, that home recording off radio or television is, and always has been, fair use) therefore are entitled to great weight.

* * *

Thus, the Ninth Circuit erroneously refused to examine the legislative history showing that Congress, believing home use was fair use, did not intend that the New Act would prohibit home videotaping.

II.

THE COURT SHOULD LIMIT THE DOCTRINE OF CONTRIBUTORY INFRINGEMENT

A. The Ninth Circuit's Opinion Represents An Unprecedented Expansion Of Contributory Infringement Doctrine.

The Ninth Circuit found DDBI, an advertising agency, liable for contributory infringement along with the manufacturers and retailers of the Betamax. It did so, despite the following findings of the District Court, which it did not disturb:[13]

1) "[D]efendants' advertisements, even assuming they gave the impression of legality, did not misrepresent any fact within the knowledge of the defendants." (Pet. App. at 101).

2) "[T]here was no evidence at trial that any advertisements or other statements by defendants in any way induced or caused to be made any of the copies at issue." (Pet. App. at 93-94).

Even in the face of these findings, the Ninth Circuit held DDBI liable because it was "sufficiently engaged in the enterprise [of marketing the Betamax] to be held accountable." Pet. App. at 27. This holding is unprecedented. It stretches the doctrine of contributory infringement beyond the limits of reason.

Even as traditionally defined, the doctrine of contributory infringement is sweeping in its scope.

> "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a

13. The Ninth Circuit's disregard for the District Court's finding is error. Only recently, in the context of a contributory trademark infringement action, this Court reversed the Second Circuit's similar disregard for a District Court's findings. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 50 U.S.L.W. 4592, 4595 (U.S. June 1, 1982). The district court in that case had found that a drug manufacturer did not commit contributory trademark infringement since it did not induce or aid pharmacists in substituting its drugs for those of another manufacturer. 50 U.S.L.W. at 4595. The Court of Appeals rejected these findings without holding them clearly erroneous. 50 U.S.L.W. at 4596. This Court reversed: "The Court of Appeals erred in setting aside findings of fact that were not clearly erroneous." *Id.*

'contributory' infringer." *(Gershwin Publishing Corp. v. Columbia Artists Management, Inc.,* 443 F.2d 1159, 1162 (2d Cir. 1971).)

However, in announcing this rule, the Second Circuit made clear that it was not adopting the quantitative approach implicit in the "sufficient engagement" test adopted by the Ninth Circuit here. Thus, in a limiting footnote, the Second Circuit quoted portions of this Court's decision in *Fortnightly Corp. v. United Artists Television Corp.,* 392 U.S. 390, 396-97 (1968), as follows:

> "8. See *Fortnightly Corp. v. United Artists Television, Inc.,* * * * in which the Court explained that 'mere quantitative contribution cannot be the proper test to determine copyright liability * * * Rather, resolution of the issue * * * depends upon a determination of the function that the [alleged infringer] plays in the total [reproduction] process. * * *' " (443 F.2d at 1162 n.8.)

Thus, the Second Circuit would not impose contributory infringement liability on a party with a purely "quantitative" role, like the advertising agency in the present case, because that would conflict with this Court's dicta in *Fortnightly.* Professor Nimmer is in accord. 3 M. Nimmer, *Nimmer On Copyright* §12.04(A) at 12-38 n.22 (1981).

Perhaps because courts recognized that the *Gershwin* test could not be applied in a simple, quantitative manner, no advertiser has been held liable for contributory infringement on the basis of such indirect involvement in the infringement.[14] The Ninth Circuit's ruling now brings to reality the nightmarish dangers of "quantitative" analysis which this Court foresaw in *Fortnightly:*

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14. We have found only three cases holding advertising agencies liable for copyright infringement. In each, the agency was directly involved in the actual infringement. *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.,* 327 F. Supp. 788, 791-92 (S.D.N.Y.), *remanded on other grounds, sub nom., Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp.,* 453 F.2d 552 (2d Cir. 1971) (agency knowingly participated in packaging and selling pirated recordings and dealing directly with the customers); *Davis v. E. I. DuPont de Nemours & Co.,* 240 F. Supp. 612, 631-32 (S.D.N.Y. 1965) (agency participated in, and had power to supervise, the writing of a television script that infringed copyrighted play); *Robertson v. Batten, Barton, Durstine & Osborn,* 146 F. Supp. 795, 797 (S.D. Cal. 1956) (agency created a commercial jingle incorporating a copyrighted hit song and performed it after infringement notice).

> "[M]ere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement — not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and indeed, every television set manufacturer." (392 U.S. at 397.)

So too here, a rule that makes Sony's advertising agency liable on these facts can just as easily be applied to the manufacturers who sell Betamax components to Sony or the television networks who broadcast copyrighted shows with knowledge that there are three million VTRs in use in the United States and who count those VTR owners in their audience calculations when selling commercial time to sponsors.

This court should limit contributory infringement actions by a test based on fault of the advertiser or ability to control the infringing actions. The Ninth Circuit's vague "sufficient engagement" test must be reversed to prevent unjust results, such as the one in this case, where the advertising agency was held liable for conduct over which it had no control and from which it benefited, at best, only indirectly.

B. Contributory Infringment Should Be Limited By Reference To the Staple-Item-of-Commerce Doctrine Developed Under The Patent Law.

Another way in which this Court should limit contributory infringement is by reference to the staple-item-of-commerce doctrine that limits contributory infringement in the patent area.[15]

Recognizing that the Betamax still has substantial non-infringing uses even if home-use recording were viewed as infringement, the district court held that the

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15. In the patent context, mere advertisement of an infringing article does not constitute infringement. *Ling-Temco-Vought, Inc. v. Kollsman Instrument Corp.*, 372 F.2d 263, 270 (2d Cir. 1967), *citing Knapp-Monarch Co. v. Casco Prod. Corp.*, 342 F.2d 622, 626 (7th Cir.), *cert. denied*, 382 U.S. 828 (1965).

marketing of this device was not contributory infringement by analogy to the staple-item-of-commerce doctrine in patent law.[16] To the extent that the Ninth Circuit applied this doctrine at all, it completely eviscerated it, for it held that the Betamax was not a staple item because it is "sold for the *primary purpose* of reproducing television programming," most of which is copyrighted.[17]

As this Court has made clear, the test for a nonstaple item is whether it is "capable *only* of infringing use," not whether its *primary* use is infringing. *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 213 (1980) (emphasis added). There is an enormous difference.[18]

Recognizing the staple-item-of-commerce doctrine in the common law of copyright infringement will give advertising agencies a standard by which they can determine which products they may advertise. It will also

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16. That doctrine is codified at 35 U.S.C. § 271(c) which provides:

> "(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, *knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use*, shall be liable as a contributory infringer." (35 U.S.C. § 271(c) (emphasis added).)

When this statute is quoted in full it appears that there is more to the question of contributory infringement than consideration of whether a staple or nonstaple item is being manufactured. The item must also be a "material part" of the machine, etc. Neither court below considered that the Betamax is not a component of the thing protected by the copyright statute, copyrighted writings. Thus, the Betamax manufacturer is more analogous to the manufacturer of a tool-and-die machine used to make a nonstaple component than it is analogous to the maker of the nonstaple component itself. The advertising agency, is, of course, yet further removed.

17. Pet. App. at 25-26 (emphasis added). Even under this view, of course, there remains a great deal of programming which can be recorded without infringement or objection, Pet. App. at 97, and there are other substantial non-infringing uses of VTRs (*e.g.*, home-videotaping of family events or playback of purchased or rented cassettes). *See* Pet. App. at 41. A consumer can thus acquire and enjoy a Betamax without engaging in conduct that the Ninth Circuit would view as infringing.

18. For example, in the case of a recording device that is used for copyright infringement 51% of the time, the Ninth Circuit rule would give the owner of the copyright to a single episode of "The Mickey Mouse Club" the power to suppress this technology completely, precluding exploitation of the other 49% of its uses.

See also Midway Mfg. Co. v. Arctic Int'l, Inc., 211 U.S.P.Q. 1152 (N.D. Ill. 1981), where the court, following the *Dawson* approach, declined to enjoin preliminarily the manufacture and sale of speed-up devices for use on video games, pending a trial to determine whether the devices were designed "*solely* to modify" plaintiff's copyrighted games. *Id.* at 1159 (emphasis added).

prevent the law of copyright contributory infringement from becoming a major barrier to the development of information technologies.

III.

THE NINTH CIRCUIT'S EXPANSION OF CONTRIBUTORY INFRINGEMENT LIABILITY WILL HAVE A CHILLING EFFECT ON SPEECH AND INVENTION

Unless overturned by this Court, the overly inclusive view of contributory infringement adopted by the Ninth Circuit in this case will have a chilling effect upon commercial speech and invention.

From the perspective of an advertising agency the chilling effect flows from the imposition of liability upon an agency for doing nothing more than advertising a product which, even if the Ninth Circuit's view of home use were correct, is capable of both infringing and substantial non-infringing uses.

The most prudent reaction to such contourless rules of liability is for an agency to eschew involvement with any product which is capable of some infringing use. Yet this is the type of excessive self-censorship or chilling effect which this Court has taken great pains to prevent.[19] While the facile reply may be that such advertising is purely commercial speech, and thus entitled to lesser protection, there is far more to it than that. As this Court said in *Bates v. State Bar of Arizona,* 433 U.S. 350, 363-64 (1977):

> ". . . [Commercial] speech should not be withdrawn from protection merely because it proposed a mundane commercial transaction. . . . The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. . . . And commercial speech serves to inform the public of the availability, nature and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free

19. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 390 (1973) ("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.").

> enterprise system. . . . In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking. . . ."[20]

Certainly, commercial speech may be regulated, but any such regulation must be undertaken "with care and in a manner no more extensive than reasonably necessary to further substantial interests." *In re R.M.J.*, 50 U.S.L.W. 4185, 4190 (U.S. Jan. 25, 1982). This the Ninth Circuit has not done. Rather, it has imposed liability in such a way as to preclude advertising of even the substantial, concededly non-infringing uses of the Betamax, without ever considering the first amendment implications of its ruling.

The chilling effect of the Ninth Circuit's ruling extends far beyond the impact upon advertising agencies and commercial speech. It has a similar impact upon invention. Thus, the inventor and manufacturer of the Betamax is being prevented from exploiting its non-infringing uses. Moreover, given the contributory infringement liability imposed upon all links in the manufacture and distribution chain of the Betamax, we must anticipate that the inventor of the next technological innovation of this type will face significantly increased barriers in attempting to convince a manufacturer, distributor or retailer to take on the new product. Higher barriers will hamper the exploitation of such inventions and, to that extent, defeat the societal goal of encouraging invention.[21]

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20. *Accord, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 761-65 (1976).

21. The primary purpose of patent and copyright protection is the promotion of the "Progress of Science and Useful Arts." U.S. Const., art I, §8, cl. 8. *See* 1961 Report at 5. Reward to patent and copyright owners is a secondary consideration. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954). By its vast extention of contributory infringement, the Ninth Circuit is promoting the exclusive rights of "Authors" to the detriments of the rights of "Inventors" and of "Progress" in the "Useful Arts."

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit in this action should be reversed.

Respectfully submitted,
JOHN A. DONOVAN
(Counsel of Record)

A. HOWARD MATZ
JOHN J. KRALIK IV

HUGHES HUBBARD & REED
555 South Flower Street
Los Angeles, California 90071
(213) 489-5140

Attorneys for Amici Curiae
McCANN-ERICKSON, INC.,
BATTEN, BARTON, DURSTINE & OSBORN, INC.,
BACKER & SPIELVOGEL, INC.
WARING & LAROSA, INC., and
AMMIRATI & PURIS INC.

Of Counsel:
LEO A. EGAN
BARRY J. WAGNER
PHILIP S. REISS
DAVID FLEISCHER
RAYMOND W. MERRITT

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APPENDIX A.

The Register's 1961 Report stated at 28-29:

"a. The Present Law.

"The present statute does not provide explicitly for the right to perform (*i.e.*, to exhibit) a copyrighted motion picture. Motion pictures were not mentioned in the act of 1909. By an amendment in 1912, they were added to the classes of works enumerated in section 5, but no corresponding amendment was made in section 1 to provide for the right to perform motion pictures.

"The courts have attempted to fill this gap by applying the terms of section 1 to the performance of motion pictures. In several decisions the courts have held that dramatic motion pictures (photoplays) are a species of dramatic works and are therefore accorded the right of public performance given to dramatic works by section 1(d). The more difficult problem of nondramatic motion pictures was presented to the Second Circuit Court of Appeals in *Patterson v. Century Productions* (93 F.2d 489 (1937)), in which an infringing copy of a documentary (nondramatic) motion picture had been made and exhibited publicly in a theater. The court held that the exhibitor had infringed the copyright, on the ground that the projection of a motion picture on the theater's screen constituted the making of a 'copy' under section 1(a).

We believe this last decision is an example of the maxim that 'hard cases make bad law.' In reaching what was no doubt a just result, and apparently seeing no other provision in the statute that would fit the case, the court stretched the concept of 'copying' to new lengths. While that case involved a public exhibition, the theory of 'copying' on which the decision was based, if followed to its logical conclusion, would have a far-reaching effect: any unauthorized projection of a motion picture, private as well as public, would be an infringement of the copyright. Whether the courts would so

hold in a case involving a private projection is still a matter of conjecture."

* * *

The 1961 Report further provided, at 29-30:

"d. Private Performances.

"Motion picture producers and distributors have urged that the performance right in motion pictures should extend to what are clearly private performances, including performances given in private homes. They point to *Patterson v. Century Productions*, and its concept that exhibition is a form of 'copying,' to support their position. Motion picture films are commonly leased for exhibition at specified places and dates. Most leases are for commercial exhibitions, but many films are also leased for home use. It is argued that in either case private exhibitions beyond the terms of the lease should constitute an infringement of copyright.

"This argument may have some theoretical plausibility, but we would question it for several reasons:

"Injury to a copyright owner from private performances beyond the terms of a lease would be minimal. He may be entitled to the usual license fee as damages for a breach of contract, but the statutory damages for copyright infringement would be grossly excessive.

"As a practical matter, unauthorized private performances could rarely be discovered or controlled.

"Many motion picture films are sold for use in homes, schools, libraries, and the like. The purchaser should not be subjected to the risk of liability for private performances that the copyright owner might contend are not authorized.

"New technical devices will probably make it practical in the future to reproduce televised motion pictures in the

home. We do not believe the private use of such a reproduction can or should be precluded by copyright." (Emphasis added.)

APPENDIX B.

The MPAA's 1962 Memorandum, after contending that the copyright owner of a motion picture should be protected against showings of bootleg prints by libraries, museums and collectors, concluded:

> "If the Register is concerned that we might charge a homeowner with giving an unlicensed private performance of our film by receiving it on the television set in the normal course, on a nontoll, nonclosed circuit, basis, upon analogy to the *Patterson* and *Jewell-LaSalle* cases, supra, there is no intention of so doing. But there are situations where private performance is a serious matter. Why attack the basic right? Appropriate provisions can take care of the innocent home owner receiving a general TV broadcast on his television screen."

Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess. 350 (Comm. Print 1963).

APPENDIX C.

The MPAA memo of January 26, 1965 stated, in part:

> "The express performing right so provided, however, is to perform the motion picture 'publicly.' Our 1962 position paper urged that the motion picture performing right not be qualified by a requirement of 'public' (as it presently is not under the 'copying' concept by which *Patterson v. Century Productions* placed it under Sec. 1(a) of the 1909 Act). This was asked because of the very serious situation existing with respect to thousands of copyrighted films which have come into the unauthorized hands of bootleg distributors for distribution by way of rentals for performances at schools, clubs, camps, churches, factories, homes, etc. We appreciate, however, that a great part of this problem has been alleviated by two other provisions in the new legislation. The first is the above express 'rental' right, by which unauthorized renters of copyrighted motion pictures prints, the possession of which prints has not been obtained under any lawful transfer of title thereto, can be held for infringement. The second is an express definition of 'publicly,' in sec. 5(b)(3) in line with suggestions made by undersigned counsel, which would now include any gathering of a substantial number of persons outside the normal family circle and its social acquaintances."

Copyright Law Revision, Part 5, 1964 Revision Bill with Discussion and Comments, 89th Cong., 1st Sess. 302-03 (Comm. Print 1965).

APPENDIX D.

The Register's 1965 Report stated, in part:

"Concern has been expressed on behalf of motion picture companies as to the possible dangers of 'archival' reproductions finding their way into the bootleg film market [the question under discussion was whether broadcasters should have the right to make and retain one ephemeral recording of a broadcast copyrighted picture for archival purposes]. However, the imminent development of home video tape recordings seems likely to make ephemeral recordings by authorized transmitters a minor source of danger. In any case, we would be opposed to a provision requiring the destruction of ephemeral recordings; many of them will constitute an irreplaceable record of a historical event, a creative work, or a virtuoso performance of incalculable value to future generations." (Emphasis added.)

Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1965 Revision Bill, 89th Cong., 1st Sess. 47 (Comm. Print. 1965).

APPENDIX E.

In the discussion of the 1971 bill on the House floor, Rep. Kastenmeier reiterated that its purpose was to strike at commercial piracy (not home recording):

> "The creation of a limited copyright in sound recordings as is done by S. 646 offers a rational solution [to the piracy problem] .... The committee similarly believes that the interest of the producers of sound recordings in freeing their product of piracy — defining piracy as the unauthorized *commercial* duplication *and sale* of a reproduction of a sound recording — warrants legislative effectuation and support."

117 Cong. Rec. 34,748 (Oct. 4, 1971) (emphasis added).

The ranking minority member of the subcommittee, Representative Railsback, supported the Chairman's position, stating that the bill would:

> "... for the first time provide legitimate producers of phonograph records and tapes with effective legal remedies against the so-called pirates who have been reproducing their products without authority, and selling them in competition with the original producers themselves."

Id. at 34,749.

APPENDIX F.

The 1971 Amendment added subsection 5(n), "Sound recordings."

The 1971 Amendment also added subsection 1(f), providing that the owner of copyright:

"... shall have the exclusive right:

* * *

"(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: Provided, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: Provided further, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use."

The 1971 Amendment further added the following definitions to § 26:

"For the purpose of this section and sections 10, 11, 13, 14, 21, 101, 106, 109, 209, 215, but not for any other purpose, a reproduction of a work described in subsection 5(n) shall be considered to be a copy thereof. 'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. 'Reproductions of sound recordings' are material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated,

either directly or with the aid of a machine or device, and include the 'parts of instruments serving to reproduce mechanically the musical work,' 'mechanical reproductions,' and 'interchangeable parts, such as discs or tapes for use in mechanical music-producing machines' referred to in sections 1(e) and 101(e) of this title."

APPENDIX G.

The May 25, 1971 letter from the Librarian of Congress to the House Judiciary Committee stated, in part:

> "The most fundamental question raised by the bill is its relationship to the program for general revision of the copyright law. As noted above, the revision bill now pending in the Senate has parallel provisions, and if general revision were on the threshold of enactment, S. 646 would be unnecessary. However, some fundamental problems impeding the progress of general revision of the copyright law, notably the issue of cable television, have not yet been resolved. We agree that the national and international problem of record piracy is too urgent to await comprehensive action on copyright law revision, and that the amendments proposed in S. 646 are badly needed now. *Upon enactment of the revision bill they would, of course, be merged into the larger pattern of the revised statute as a whole.*" (1971 Report at 10 (emphasis added).)

APPENDIX H.

The 1971 House Report, at 3-4, said:

"The creation of a limited copyright in sound recordings has been under active consideration by the Congress for a number of years in connection with the program for general revision of the copyright law. The Library of Congress recommended the granting of such copyright protection in its recommendations for the general revision of the copyright law.

* * *

"The Committee regrets that action on the bill for general revision of the copyright law has been delayed, and that the problem of record piracy has not been dealt with as part of a broad reform of the Federal copyright statute. We are persuaded that the problem is an immediate and urgent one, and that legislation to deal with it is needed now. The seriousness of the situation with respect to record piracy, both nationally and internationally, is unique, and our favorable action in this instance should not be interpreted as precedent for the enactment of separate legislation on other matters involved in copyright law revision. On the contrary, we would be opposed to any effort to convert the general revision program into a program for revising the statute on a piecemeal basis."

APPENDIX I.

New Act (excerpts):

"§ 101. Definitions

" 'Sound Recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."

"§ 106. Exclusive rights in copyrighted works

"Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

"(1) to reproduce the copyrighted work in copies or phonorecords;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;"

"(4) in the case of ... motion pictures and other audiovisual works, to perform the copyrighted work publicly....

"§ 114. Scope of Exclusive Rights in Sound Recordings

"(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), and (3) of section 106, and do not include any right of performance under section 106(4).

"(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords, or of copies of motion pictures and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording. . . . The exclusive rights of the owner of copyright in a

sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. . . ."

Amicus Brief

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No. 81-1687

IN THE

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,

Respondents.

Brief *Amici Curiae* of Minnesota Mining and Manufacturing Company, Maxell America, Inc., and Tandy Corporation, on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SIDNEY A. DIAMOND
(Counsel of Record)
GRIER CURRAN RACLIN

1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Attorneys for *Amici Curiae*

Of Counsel:

Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

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INTRODUCTION

Minnesota Mining and Manufacturing Company (3M), Maxell America, Inc., and Tandy Corporation, respectfully file this brief *Amici Curiae* in support of Petitioner, the Sony Corporation of America. Petitioners and Respondents have granted their consent to the filing of this brief pursuant to their "Written Consent of All Parties to Filing of *Amici Curiae* Briefs," on file with the Court.

STATEMENT OF INTEREST

The *amici curiae* filing this brief are manufacturers of videotape. In general, videotape is the medium upon which audio-visual material, such as television programs, is recorded either directly from a television camera or indirectly from broadcast signals. Under current industry practice, professional producers record on the larger videotape formats, such as 2-inch Quadruplex, 1-inch Helical Scan or 3/4-inch U-Matic. Video-recording by individuals in the home, on the other hand, is done almost entirely on videocassette recorders (VCRs) using 1/2-inch videocassette tape.

Videotape in the larger formats has been manufactured and sold for over 25 years. It was produced originally for the principal purpose of recording network programs for later re-broadcast in different time zones and for archival preservation,* and later as a substitute for film in the production of television programs and commercials. Videocassettes were developed more recently. They are used for many lawful purposes in addition to recording by VCRs, including educational and training programs, prerecorded motion pictures, and home movie production.**

Manufacturers of videotape sold approximately $320 million worth of 1/2-inch videocassettes to retailers in the United States in 1981.*** This amount is expected to grow to one billion dollars in 1986. Approximately 4.6 million individuals will purchase 1/2-inch videocassettes in 1982, with 17.5 million more purchases projected in 1986. The domestic

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*Section 112 of the Copyright Act specifically sanctions these uses. 17 U.S.C. §112.

**Cass, Revolution In the Wasteland 104-05 (1981).

***Estimate made by the International Tape Association based upon a poll of its membership, December, 1981. All remaining estimates of sales, etc., herein were made by 3M and reflect the wholesale price of videotape. Under normal industry practice, the actual retail price of videotape and videocassettes might be as high as twice the wholesale price.

manufacturers of 1/2-inch videocassettes* employ thousands of Americans and generate many million dollars worth of sales and income taxes.** The market for 1/2-inch videocassettes is the most significant market for videotape manufacturers, and the most important segment of that market is the retail sales of blank 1/2-inch videocassettes for use in the home. It is estimated that in 1982, these home sales alone will be worth from $260 to $275 million.

The effect of the decision below is to make the manufacturers and sellers of VCRs *ipso facto* contributory infringers of the copyrights owned by the producers of television programs that are recorded in the home by individual VCR owners. If the decision of the Ninth Circuit is affirmed by this Court, the manufacture of home videocassette recorders would be restricted severely if not halted, and the projected growth in the market for 1/2-inch videocassette tape produced by the *amici* would effectively be destroyed. This would result irrespective of what remedy might be ordered by the district court on remand. An injunction against the future sale of VCRs, the imposition of a continuing royalty upon the sale of VCRs or videocassettes (even if we were to assume the judiciary's authority to impose such a non-statutory remedy), or the required payment of statutory damages, which could amount to untold millions of dollars,*** all would have a disastrous effect on the market for 1/2-inch videocassettes and would eliminate or substantially reduce projected increases in sales and employment in the videotape industry. Jobs would be lost as manufacturers compete for a static number of potential buyers, and research and development expenditures would be cut substantially if not eliminated, significantly decreasing future technological advances and innovations not only in

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*Manufacturers of 1/2-inch videocassettes with manufacturing plants in the United States include 3M, Sony, Maxell, Tandy (parent of manufacturer of "Memorex" brand audio and videotape), TDK Electronics Corp., Ampex Corp., and BASF Canada, Inc. Sony alone employs over 1,800 people in its domestic tape plant. Petition for Writ of Certiorari (hereinafter referred to as "Pet.") at 9.

**1982 sales taxes alone are projected to be over $21 million.

***Section 504(c) of the Copyright Act provides for $250 to $10,000 of damages for *each* infringement. 17 U.S.C. §504(c).

videotape, but in the communications industry as a whole.* This result clearly is not the intent of the Copyright Clause of the Constitution, which was included, by its very terms, "to promote the progress of Science and the Useful Arts." U.S. Const. art I, §8 cl. 8.

Blank 1/2-inch videocassette tape made by the *amici*, even more so than the VCRs themselves, is a "staple item of commerce."** The cassettes are used not only to record Respondents' copyrighted television programs in the home, they also are used, *inter alia*:

(a) Professionally, to record, with the permission of the respective copyright owners, motion pictures, instructional programs, and other material for purchase or lease by VCR owners;***

(b) To record and play back "home movies" and other similar material recorded by the owner with a 1/2-inch videocassette camera;****

(c) To record and play back television broadcast programs that are not protected by copyright or whose copyright proprietors have announced or otherwise indicated they consent or do not object to such copying;*****

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*The manufacture and sale of home informational products (entertainment centers, computers, security and communications devices), of which VCRs and videotape will be necessary parts, is projected to be a $200 billion industry by the mid-1990s.

**A "staple item of commerce" is an item suitable for substantial noninfringing uses. *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488-89 (1964). Manufacturers of staple items of commerce generally are not subject to liability as contributory infringers when the owner of the item used it for direct patent infringement, *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912), *ovrl'd. on other grounds, Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917), and this same principle has been applied in copyright infringement cases, *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62-63 (1911).

***Fifty-five to sixty-five percent of VCR owners use their VCRs in part to play purchased or leased prerecorded cassettes.

****It is estimated that by 1986, forty percent of all VCR owners will purchase a 1/2-inch videocassette camera for home use.

*****Pet. at 4-5.

(d) To prepare professional educational and training programs;* and

(e) Potentially for new, non-infringing purposes that the rapidly advancing technology of the industry will develop if it is permitted to continue to grow as anticipated.**

In all, these clearly non-infringing uses will be worth hundreds of millions of dollars of 1/2-inch videocassette sales. It would be a harsh and anomalous result – and an unwarranted extension of the doctrine of contributory infringement in copyright law – if the virtual elimination of the present videocassette recorder market which will result from an affirmance of the Ninth Circuit's decision, also eliminated the growth of the videotape manufacturing industry represented by these *amici*.

In light of the substantial injury to the manufacturers of videotape that would follow from an affirmance of the Ninth Circuit's decision, the *amici* filing this brief clearly have an interest in this proceeding. Furthermore, the *amici* believe that the arguments made herein might not otherwise be presented to the Court. It is for these reasons that this brief *amici curiae* is submitted.

SUMMARY OF ARGUMENT

Time-shifting, the taping and viewing of a program once or twice only a few days after taping, is the principal use of VCRs and serves a "paramount" First Amendment goal by providing access to information broadcast into private homes by Respondents. Consequently, time-shifting can be limited or abridged only to secure a compelling interest, and only in a manner which is least restrictive of the protected activity.

The Copyright Act's goal of encouraging creativity does not amount to a compelling interest in this case because the Respondents are not economically harmed by the principal use of

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*Cass, *supra* note p. 2 at 104-05.

**For example, developments in videotape technology are leading to corresponding developments in digital recording of both audio and video material, which will permit both miniaturization and quality improvement.

VCRs, time-shifting, and thus will not be discouraged from creating new works if time-shifting is allowed. Respondents are compensated for time-shifting in the same manner they are compensated for all television viewing of their material: through the rating services.

If the creation of tape libraries of Respondents' works is to be prohibited, the general banning of all videorecording is not the proper means to use to reach this end. The Ninth Circuit's opinion, therefore, which decided that all home videorecording of Respondents' material violated the Copyright Act, was overbroad and did not utilize the least restrictive means of securing whatever copyright interest might justify a limitation on the creation of tape libraries.

Consequently, this Court either should reinstate the district court's conclusion that home videorecording, which is principally done for time-shifting purposes, is a "fair use" of Respondents' copyrighted material, or should find that home videorecording cannot constitutionally be prohibited or limited generally by the Copyright Act.

ARGUMENT

The Copyright Clause and the First Amendment of the Constitution are apparently inconsistent. On the one hand, the First Amendment broadly proclaims that "Congress shall make *no* law . . . abridging the freedom of speech or of the press . . ." U.S. Const. amend I (emphasis supplied). On the other hand, the Copyright Clause states in equally broad terms that the Congress has the power "To promote the progress of Science and the Useful Arts, by securing for limited times to Authors . . . the *exclusive* Right to their respective Writings . . . ." *Id.* at art. I, §8 cl. 8 (emphasis supplied).

Consequently, to avoid the anomalous result of finding one of these constitutional provisions to be unconstitutional, commentators have struggled for years to interpret these

provisions consistently,* and courts have engaged in *ad hoc* balancing of the respective demands of the Copyright Act and the First Amendment. This balancing either is addressed through the court's determining whether the challenged use of copyrighted material was a "fair use"** within the Copyright Act,*** or through the court's consideration of whether the First Amendment imposes some non-statutory limitations on the Copyright Act.**** Depending upon the weight ascribed to the competing demands of the Copyright Act and the First Amendment, the court decides whether the use should be permitted.

**See, e.g.*, Patterson, *Private Copyright & Public Communication: Free Speech Endangered*, 28 Vand. L. Rev. 1161 (1925) (use of a copyrighted work which does not compete economically with the copyright holder's use is protected by the First Amendment); Denicola, *Copyright and Free Speech – Constitutional Limitation on the Protection of Expression*, 67 Cal. L. Rev. 283 (1979) (whenever conflicting, the statutory property interests of copyright must yield to the constitutional protection of the First Amendment); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. Rev. 1180 (1970) (the First Amendment protects access to the *idea* expressed by an author, while copyright protects the specific *expression* of that idea).

**"Fair use," some of the relevant considerations of which are set forth in section 107 of the Copyright Act, 17 U.S.C. §107, is a judicial doctrine allowing "others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner." *Rosemont Enterprises v. Random House*, 366 F.2d 303, 306 (2d Cir. 1966) (*quoting* Ball, Copyright and Literary Property 260 (1966)).

***17 U.S.C. §107. *See, e.g., Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171 (5th Cir. 1980); *Wainwright Securities v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Rosemont Enterprises v. Random House*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *New York Times v. Roxbury Data Interface*, 434 F. Supp. 217 (D.N.J. 1977); *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp 130 (S.D.N.Y. 1968).

****E.g., Triangle Publications v. Knight-Ridder Newspapers*, 445 F. Supp. 875 (S.D. Fla. 1978), *aff'd*, 626 F.2d 1171 (5th Cir. 1980); *and see* Denicola, *Copyright and Free Speech – Constitutional Limitations on the Protection of Expression*, 67 Cal. L. Rev. 283 (1979); and *First Amendment Exception To Copyright: A Proposed Test*, 1972 Wisc. L. Rev. 1158 (1977).

When addressing this balance, the monopoly rights granted by the Copyright Act are generally considered by the courts to be only *very limited* exceptions to the generally applicable right of the public to have full and free access to all communications and information released to the public, *Twentieth Century Music v. Aiken*, 422 U.S. 151 (1975), and are tolerated *only* for the purpose of encouraging creativity and the development of the arts and sciences. The copyright owner's monetary award is not the only or even the primary purpose of the Copyright Act. *U.S. v. Paramount Pictures*, 334 U.S. 131, 155 (1948). Rather, the author's monopoly-based return simply reflects Congress' determination that monetary incentives will best encourage creativity. *Twentieth Century Music v. Aiken, supra*, 422 U.S. at 156 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Berlin v. E.C. Publications*, 329 F.2d 541, 543-44 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). The monetary reward is not appropriate when it does not serve this underlying purpose of the Copyright Act. *Paramount Pictures, supra*, 344 U.S. at 159; *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). If a direct conflict arises between the Copyright Act and the First Amendment, the Act must be strictly construed, *Wheaton v. Peters*, 33 U.S. 591, 661-63 (1834), and interpreted in light of its purpose to encourage creativity. As with all other acts, the Copyright Act must be construed as narrowly as possible to achieve its goal to encourage creativity while maintaining consistency with the overriding constitutional demands. *Triangle Publications v. Knight-Ridder Newspapers*, 445 F. Supp. 875, 882 (S.D. Fla. 1978), *aff'd*, 626 F.2d 1171 (5th Cir. 1980) (citing *Crowell v. Benson*, 285 U.S. 22 (1932)).

The policies served by the First Amendment and the Copyright Clause specifically and perhaps uniquely conflict in this case. The testimony and surveys in the record, and the district court's specific factual findings, establish that the principal use of VCRs is to "time-shift," or delay the viewing of material transmitted into the VCR owner's home over the broadcast media.* Pet. App. at 43-48. The recording of copyrighted television programs for repeated viewings, or the

*The "Crossley" survey introduced by Petitioners, for example, indicates that approximately 96% of all VCR owners record and replay

"librarying" of recorded programs, is only a secondary and relatively unusual use of VCRs.

VCRs accomplish time-shifting by recording programs for later viewing by the owner. The normal procedure is that while the owner is away from his television receiver, or while he is watching a program on another channel, the VCR will be set to record a program automatically and keep it available for viewing by the owner at a later time. The recorded program normally is viewed within a few days of the recording, is viewed only once or twice, and then is erased by the recording of a new program on the same tape.* In addition to entertainment programming, VCRs are often used to record political information,** educational programming, religious programming, and the like.***

Time-shifting overcomes the arbitrary scheduling limitations necessarily resulting from the scarcity of the broadcast frequencies and from the marketing strategies of the few networks and media owners who broadcast popular programs at

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programs that they otherwise would be unable to see. Pet. App. at 48. The "Field" survey introduced by Respondents similarly concluded that approximately 75% of VCRs are used at least half of the time to record programs that otherwise would have been missed. *Id.* at 47-48. Given the fact that over three million people presently own VCRs, these surveys indicate that between 2.5 and 2.8 million people use VCRs most often to obtain otherwise unavailable access to information transmitted over the broadcast media.

The specific testimony of individual Betamax owners in this case also establishes that time-shifting was their principal use of VCRs and that this use allowed new access to the media for later viewing of programs which otherwise would have been missed. It was their practice generally to view a tape once or twice soon after recording, and then to erase the tape to allow the recording of other programs in a similar fashion. Appendix to Petition for Certiorari (hereinafter referred to as "Pet. App.") at 43-47.

**Id.*

***Politically-based speech is "at the heart of the First Amendment's protections." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (citation omitted).

****The surveys in the record, see note at p.p. 8-9 *supra*, indicate that 63% of VCR owners record educational programming, 49% of VCR owners record sports programming, and 10% of VCR owners record religious programming.

the same time on different channels ("counter-programming"). Consequently, VCRs provide their owners with previously unavailable access to television programming and information that is intentionally broadcast for the use of the general public.* In effect, VCRs make the opportunity to view television programs, if not the programs themselves, no longer scarce.

By providing new access to ideas and information, time-shifting through VCRs serves a "paramount" goal of the First Amendment. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). There is little question today but that the First Amendment guarantees the public's right to have access to information. Indeed, the Court only recently stated:

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*In this case, the electronic signals VCRs record have already been "released to the public," *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394, 410 (1974), or, as specifically found by the district court: "The purpose of [VCR] use is to increase access to the material plaintiffs chose to broadcast." Pet. App. at 82.

"Broadcasting" itself is defined in the Communications Act as "the dissemination of radio communications intended to be received by the public . . . ." 47 U.S.C. § 153(o). ("Radio communications," of course, includes television broadcasting. *Allen B. DuMont Laboratories v. Carroll*, 184 F.2d 153 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951).) Consequently, any transmission which can be received only upon payment of a fee would not appear to be "broadcasting" within the Communications Act. *See National Subscription Television v. S&H T.V.*, 644 F.2d 820 (9th Cir. 1981); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 467 (6th Cir. 1980); *Home Box Office v. Pay T.V. of Greater New York*, 467 F. Supp 525 (E.D.N.Y. 1979); *KMLA Broadcast Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35 (C.D. Cal. 1967). Senator Clarence Dill, the Senate sponsor of the 1924 Radio Act, stated in this regard, when discussing the Act's intent and effect:

> First, and most important of all, radio in the United States is free. It is so free to the listener that anybody anywhere may listen in to any broadcast whatsoever. . . .
>
> This freedom of radio reception by the American people is the feature of radio that distinguishes and differentiates radio conditions in the United States from radio conditions in every other country in the world. In practically every other country, the government levies a tax on receiving sets. . . .

59 Cong. Rec. at 12335 (1920).

Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) . . . . In keeping with this principle, we have held that in a variety of contexts "the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972) (citing cases). This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them: "The right of freedom of speech and press . . . embraces the right to distribute literature . . . and necessarily protects the right to receive it." *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (citation omitted). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom. Madison admonished us that

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed. 1910).

Board of Education, Island Trees Union Free School District v. Pico, 50 U.S.L.W 4831, 4835 (June 22, 1982) (footnotes omitted).*

The right to receive ideas is recognized regardless of their social worth. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). "There is no doubt that entertainment, as well as news, enjoys First Amendment protection." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977). "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment . . . fall within the First Amendment guarantee." *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1980); *accord Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

The public's right to have access to information has been particularly protected by this Court when that information is

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*In a variety of cases, this Court has held that the First Amendment guarantees the right to listen as well as to speak, the right to read as well as to print, and the right to receive as well as to transmit. "It is now well established that the Constitution protects the right to receive information and ideas." *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (citations omitted); *see, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555, 566-67 (1980); *Bellotti, supra* note p. 9, 435 U.S. at 783; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); A. Meiklejohn, *Political Freedom* 25-28 (1960).

The right to receive information has served as a basis for many of this Court's decisions establishing the right to "speak." For example, the public's First Amendment right to be informed was the basis of this Court's recognition of the right of the press to attend and publish the results of trials, *Richmond Newspapers, supra*; the right of businesses to advertise, *Central Hudson Gas & Elec. Corp v. Public Service Comm'n of New York*; 447 U.S. 557 (1980); *Bellotti, supra; Virginia State Board of Pharmacy, supra; Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); the right to send uncensored mail, *Procunier v. Martinez*, 416 U.S. 396 (1974); the right to obtain a temporary non-immigration visa for a speaking engagement, *Kleindienst v. Mandel, supra*; the right to speak in favor of labor unions, *Thomas v. Collins*, 323 U.S. 516 (1945); the right to distribute religious handouts, *Marsh v. Alabama*, 326 U.S. 501 (1946); *Martin v. Struthers*, 319 U.S. 141 (1943); and the right to place "for sale" signs in front of homes, *Linmark Assn's v. Willingboro*, 431 U.S. 85 (1977).

transmitted over the broadcast media, as in this case. The Court has recognized that each medium of expression presents unique First Amendment problems that must be analyzed separately. *Metromedia v. City of San Diego*, 453 U.S. 490, 500 (1981); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973). Due to the scarcity of the broadcast frequencies and the pervasiveness of the medium, the Court has held that the right to receive broadcast information enjoys the broadest First Amendment protection, *Red Lion Broadcasting Co., supra*, 395 U.S. at 390, *Columbia Broadcasting System, supra*, 412 U.S. at 102, while the right to transmit information over the medium is entitled to the most limited protection, *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978). Perhaps the most often cited statement of the dominant right of television viewers to have access to broadcast information is Justice White's, when writing for the Court in *Red Lion, supra*, he stated:

> . . . [D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them. . . . Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees . . . But the people as a whole retain their interests in free speech by radio and their collective right to have the media function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, and not the right of the broadcasters, which is paramount. . . . *It is the right of the people to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.*

395 U.S. at 386, 390 (citations omitted) (emphasis supplied); *and see Kleindienst v. Mandel, supra*, 408 U.S. at 753.* This

*"The Supreme Court has ruled that the public's right to access must prevail over all other claims . . . ." *Mt. Mansfield Television v. FCC*, 442 F.2d 470, 477 (2d Cir. 1977). *See also Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973); and Judge Learned Hand's decision in 1942 to uphold the FCC's "chain broadcasting" rules, *National Broadcasting Co. v. United States*, 47 F. Supp. 940, 946 (S.D.N.Y. 1942), *aff'd*, 319 U.S. 190 (1943), where he stated: "[T]he

Court stated similarly in *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394, 408 (1974): "The privilege of receiving the broadcast electronic signals and of converting them into sights and sounds of the programs inheres in all members of the public who have the means of doing so."

The rights within the First Amendment also are particularly protected by this Court when those rights are exercised, again as in this case, within the privacy of the individual's home. As the Court stated in *Stanley v. Georgia, supra*, 394 U.S. at 564:

> This right to receive information and ideas, regardless of their social worth, see *Winters v. New York*, 333 U.S. 507, 510 (1948), is fundamental to our free society. Moreover, in the context of this case – a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home – that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

The conduct challenged in this case – the recording of television programs which Respondents are responsible for broadcasting to the general public – occurs solely within the home. There was no sale of the recording as in *U.S. v. Bodin*, 375 F. Supp. 1265 (W.D. Okla. 1974), or *Walt Disney Productions v. Air Pirates*, 345 F. Supp. 108 (N.D. Cal. 1972), *aff'd in part, rev'd in part*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979), no commercial gain to the VCR users *see Triangle Publications, supra*, 445 F. Supp. at 880,* and no publication to the general public, commercial or otherwise, as in *Zacchini, supra*, 433 U.S. 562.

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interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e., the interest, first, of the 'listeners . . . .' "

*Even if the VCR owners used their copies for commercial gain, this would not preempt a finding that VCR recording was a "fair use" of Respondents' material. *See* text at 24, *infra*.

In short, time-shifting, the principal use of VCRs to obtain new access to broadcast programming and information, is an activity protected by the First Amendment. The First Amendment protections are especially weighty in this case because the Respondents used the public's scarce broadcast frequencies to transmit their copyrighted programs to the public, and because the allegedly infringing activity occurs within the privacy of the home. These First Amendment considerations conflict with, and thus must be weighed against, the interest of the Copyright Act to encourage creativity. As recently held by the court in *Encyclopedia Britannica Dictionary Corp. v. Crooks*, Civ. No. 77-560 at 48 (W.D.N.Y., June 21, 1982):

> [T]he public interest in the dissemination of information, *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932), must be balanced against the author's motivation to create new works. *Mazer v. Stein*, 347 U.S. 201, 219 (1954), *Twentieth Century Music Corp. v. Aiken* 422 U.S. at 156.

Because time-shifting to obtain access to broadcast information is a freedom guaranteed by the First Amendment, it can be abridged or limited by operation of the Copyright Act *only* if that restriction is a "precisely drawn means" of serving a "compelling" copyright interest. *Consolidated Edison v. Public Service Comm. of New York*, 447 U.S. 530, 540 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Nixon v. Administrator of General Services*, 433 U.S. 425, 467 (1977). In addition to assessing the substantiality of the copyright interests, the Court must also determine whether those interests could be served by means that would be less intrusive on time-shifting than the remedies authorized by the Court of Appeals. *Schad v. Borough of Mount Ephraim, supra*, 452 U.S. at 70-71; *Bellotti, supra*, 447 U.S. at 786. Even if the Copyright Act presents a compelling interest conflicting with First Amendment protections, that interest

> cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). Restrictions of First Amendment freedoms must be "closely drawn" to avoid unnecessary abridgments, *Belloti, supra*, 435 U.S. at 786; *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633 (1980), and "[p]recision of regulation must be the touchstone . . . ," *NAACP v. Button*, 371 U.S. 415, 438 (1960) (citation omitted).*

Similarly, a prior restraint on the exercise of a First Amendment freedom "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 238 U.S. 697 (1931).** The fact that a freedom might be abused is not a sufficient reason to prohibit the exercise of an activity altogether, and subsequent punishment for the abuse itself is the appropriate remedy consistent with the constitutional privilege. *Id.* at 720; *Village of Schaumburg, supra*. Broad prophylactic rules in the area of the First Amendment are suspect, *NAACP v. Button, supra*, 371 U.S. at 438. As stated long ago by James Madison when he was interpreting the First Amendment guarantees:

> Some degree of abuse is inseparable from the proper use of everything. . . . It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits.

**Accord Citizens Against Rent Control/Coalition For Housing v. City of Berkley*, 50 U.S.L.W. 4071, 4072 (1981); *Central Hudson Gas and Elec. Co., supra* note p. 12; *United States v. O'Brien*, 391 U.S. 367 (1968); *Talley v. California*, 362 U.S. 60 (1960); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

***Accord Lovell v. Griffin*, 303 U.S. 441, 444 (1938); *Schneider v. State*, 308 U.S. 147, 164 (1939); *Niemotko v. Maine*, 340 U.S. 268, 273 (1951); *Kunz v. New York*, 340 U.S. 290, 293 (1951); and *Staub v. Baxley*, 355 U.S. 313, 321 (1958).

Madison, Reports on the Virginian Resolution, *Madison's Works*, vol. 4 at 544 (1865).

In this case, the Ninth Circuit violated these principles when it based its decision on the conclusion that Respondents' copyrights were infringed by all home videorecording of Respondents' programs, and failed to differentiate between, for example, time-shifting and the creation of tape libraries, or between the recording of Respondents' copyrighted programs and the recording of the majority of television programming which is not copyrighted or might be copied without objection of the copyright owner, or even between the recording of educational or political information and cartoons. No investigation was made by the court into whether the Copyright Act presents a compelling reason to overcome the First Amendment's protection of time-shifting in this case, *Consolidated Edison, supra*, 447 U.S. at 530, no safeguard of protected areas was provided by the lower court, *Bantam Books, supra*, 372 U.S. at 70, and no showing was made that a more limited restriction would not have been effective, *Central Hudson Gas and Electric Corp. v. Public Service Comm.*, 447 U.S. 557, 571 (1980). The Ninth Circuit should have recognized that the principal use of VCRs, time-shifting to obtain access to information, was protected by the First Amendment. Had it done so, it could not reasonably have decided to authorize the banning of the manufacture of VCRs, even though they might occasionally be used for reasons other than pure time-shifting. The Ninth Circuit at least should have "closely drawn" its decision to avoid unnecessary abridgment of the constitutionally protected activity. *Bellotti, supra*, 435 U.S. at 786; *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

The Ninth Circuit failed even to recognize the First Amendment implications of its decision. When presented with the argument that the primary use of VCRs, time-shifting to obtain access to information, is protected by the First Amendment and thus should be considered a "fair use" of Respondents' programming, the court replied simply: "the statute does not list . . . 'increased access' as [one of the] purposes within the general scope of fair use . . . ," Pet. App. at 14; "in this case, there is no corresponding countervailing societal benefit to 'weigh against' the

copyright interest of the author . . .," *id.* at 16; and "we fail to see how the method by which appellants have chosen to distribute their work is relevant . . .," *id.* at 20-21. The previous discussion establishes that these conclusions were simply incorrect. The fact that Respondents chose to broadcast their material over the scarce public airwaves is *highly* relevant, and the First Amendment goals served by increased access to the information which is broadcast into private homes is an *important* societal benefit which at least arguably might outweigh the copyright owners' interest. As in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980), the lower court failed even to recognize any right under the Constitution for the public to have access to information transmitted over the broadcast media. Consequently, the Ninth Circuit's decision must be reversed.

Remand for further consideration of the First Amendment protections is not required in this case, however, because the record fails to establish any legitimate copyright interest sufficient to overcome the constitutional protections applying to time-shifting. There is little question, of course, that the goals of the Copyright Act are "legitimate" interests, which in many circumstances are sufficiently "compelling" to overcome the public's right to have access to copyrighted information. However, when the facts in this case are reviewed, the goals of the Copyright Act are revealed not to be sufficiently compelling.

In the cases of *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974), and *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968), which held that the re-transmission of broadcast signals by cable systems was not a "performance" of a copyrighted work so as to subject the systems to copyright liability, this Court recognized that copyright claims made with regard to television broadcast programs invoke different considerations than those arising in the context of the print media. In *Teleprompter, supra*, for example, the Court specifically addressed an argument similar to one made in this case, that the re-transmission of copyrighted motion pictures deleteriously affected the economics and market structure of the motion picture industry, and that to allow such a re-transmission would discourage creativity in that industry. In rejecting that argument, the Court stated:

> In the television industry . . . the commercial relations between the copyright holders and the licensee on the one hand and the viewing public on the other are such that dilution or dislocation of markets does not have the direct economic or copyright significance that this argument ascribes to it. Unlike propagators of other copyrighted materials, such as those who sell books, perform live dramatic productions, or project motion pictures to live audiences, holders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material – that is, the television viewers – but by advertisers who use the drawing power of the copyrighted material to promote their goods and services. Such advertisers typically pay the broadcaster a fee for each transmission of an advertisement based on an estimate of the expected number and characteristics of the viewers who would watch the program. While, as members of the general public, the viewers indirectly paid for the privilege of viewing copyrighted material through increased prices for the goods and services of the advertisers, they are not involved in a direct economic relationship with the copyright holders or their licensees.
>
> By extending the range of viewability of a broadcast program, CATV systems do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor. When a broadcaster transmits a program under license from the copyright holder, . . . he gets paid by advertisers on the basis of all viewers who watch the program. The use of CATV does not significantly alter this situation. Instead of basing advertising fees on the number of viewers within the range of direct transmission . . . broadcasters whose reception ranges have been extended by . . . CATV re-channeling will merely have a different and larger viewing market.

Teleprompter, supra, 415 U.S. at 411-12 (footnotes omitted).

The district court specifically found that an exactly

analogous situation exists in the instant case. Pet. App. at 51-54. Here, the viewers of broadcast programming do not pay the copyright holders directly for access to the programming, or on a pay-per-view basis. Rather, the copyright holders are compensated by the viewers only indirectly: they obtain their compensation from the broadcasters, who obtain their compensation from the advertisers, who obtain their compensation from the viewers in the form of purchased goods. By allowing access to the programming by an entirely new set of viewers, and thus "extending the range of viewability of a broadcast program, [a VCR] thus does not interfere in any traditional sense with the copyright holder's means of exacting recompense for [Respondents'] creativity or labor." *Teleprompter, supra*, 415 U.S. at 412.* Consequently, the access provided by VCRs, just as the access provided by the cable systems in *Fortnightly* and *Teleprompter*, does not affect in any meaningful way the compensation of copyright holders such that creativity might suffer if that access is allowed. The analysis which protected the *place*-shifting of viewers in *Fortnightly* and *Teleprompter* should also protect the *time*-shifting of viewers in the instant case.**

Moreover, Respondents are compensated for whatever impact time-shifting does have on the size of the audience of their works. The copyright license fees broadcasters pay to Respondents for the use of their material, and the charge they consequently impose on their advertisers, is, as stated in *Teleprompter*, derived *inter alia* from the estimated size of the audience of the specific program. Pet. App. at 52. These estimates are provided to the broadcasters by Nielsen and Arbitron, *id.* at 53, both of which include as a "viewer" of a specific program any VCR recording a program for later viewing.*** Thus, the copy-

*Indeed, if anything, the additional viewers *increase* the return to the copyright holders. *Teleprompter, supra* note p. 10, 415 U.S. at 413.

**In this regard, it is interesting to note that although Respondents seek to obtain payment for the viewing of programs which they allege are now viewed for free, they do not offer to repay the millions of individuals who "pay" for programming through the purchase of advertised products, but who do not own a television set or who do not view the programs in which the products are advertised.

***E.g.*, 1980-81 Reference Supplement, Nielsen Station Index, at 10 (Home recordings of programs are included [into the ratings] at time of recording"); Arbitron Description of Methodology for Television Market Reports, at 18 (October 1980).

right holders are compensated by the broadcaster for the principal use of VCRs, the time-shifting of program viewing.* The policy served by the Copyright Act thus is fulfilled in this case, and consequently, there is no copyright interest presented which is adequate to overcome the First Amendment protection applicable to time-shifting. Remand for the balancing of the competing claims of the Copyright Act and the First Amendment, therefore, is unnecessary.

Two avenues are available to this Court to address the competing considerations of the Copyright Act and the First Amendment. First, the Court could inquire into whether the First Amendment protection is sufficient to cause time-shifting to be deemed a "fair use" of the Respondents' programming within the Copyright Act's provisions. 17 U.S.C. §107. Alternatively, the Court could decide that if for some reason time-shifting is not a "fair use," that it nevertheless cannot be prohibited because it is a constitutionally protected activity. A holding based upon fair use analysis would seem preferable given the more limited applicability of a statutory interpretation.

The fair use doctrine "offers a means of balancing the exclusive rights of a copyright holder with the public's interest in the dissemination of information. . . ," *Wainwright Securities v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), and "frequently serves to eliminate potential conflicts between copyright and free speech," *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1174 (5th Cir. 1980); *Wainwright Securities, supra*, 558 F.2d at 95. The fair use doctrine has been referred to as a

> 'rule of reason' fashioned by Judges to balance the author's right to compensation for his works, on the one hand, against the public's interest in the widest possible dissemination of ideas and information, on the other.

Triangle Publications, supra, 626 F.2d at 1174 (citation omitted).

*With regard to what, if any, economic harm is imposed upon Respondents from the alleged "librarying" of tapes, (1) the district court found that Respondents had failed to establish any harm, *see* text *infra* at 27, and (2) even if true, the creation of libraries of tapes containing Respondents' material is a fractional use of VCRs and certainly is not sufficient to prohibit VCR recording altogether.

Many cases have used fair use analysis to balance the competing considerations of the Copyright Act and the First Amendment. In *New York Times v. Roxbury Data Interface*, 434 F.Supp. 217, 221 (D.N.J. 1977), for example, the defendant's publication of an index of plaintiff's copyrighted work was held to be a protected "fair use" in part because "the defendant's index will serve the public interest in the dissemination of information." In *Rosemont Enterprises v. Random House*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), the court refused on fair use grounds to enjoin the publication of a biography of Howard Hughes even though the biography contained, without authorization, articles copyrighted by the plaintiff. The court noted that whether the fair use privilege may be properly applied to a particular situation was initially dependent upon "whether their distribution would serve the public interest in the free dissemination of information . . . ." *Id.* at 307; *accord Meeropol v. Nizer*, 361 F. Supp 1063, 1067-68 (S.D.N.Y. 1973). In *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp 130 (S.D.N.Y. 1968), the court allowed the unauthorized publication of copyrighted pictures of President Kennedy's assassination. The court found that "there is a public interest in having the fullest information available on the murder of President Kennedy." *Id.* at 146. In *Meeropol v. Nizer*, 560 F.2d (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), the court found the fair use doctrine applicable to the use of copyrighted letters of Julius and Ethel Rosenberg in part because of the "public's interest in dissemination of information . . .." *Id.* at 1068. The court found that "the mere fact that [the defendant's] book might be termed a popularized account of the Rosenberg trial lacking substantial scholarship and published for commercial gain does not, standing alone, deprive [the defendant] or his publisher from the fair use doctrine." *Id.* at 1069.*

See also Berlin v. E.C. Publications, 329 F.2d 541, 545, (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (Mad Magazine parody of plaintiff's copyrighted song was a "fair use" even though "the societal interest in encouraging the broad-gauged burlesque of Mad Magazine is admittedly not readily apparent.); *Meeropol v. Nizer*, 417 F. Supp 1201, 1207 (S.D.N.Y. 1976), *aff'd in part, rev'd in part*, 560 F.2d 1061 (2d Cir. 1977), *cert denied*, 434 U.S. 1013 (1978); *Triangle Publications, supra* note p. 7, 626 F.2d 1171.

The doctrine of fair use was incorporated in the Copyright Act with the specific anticipation that it would allow the Act to be adaptable to new technological improvements, such as VCRs. As stated in *Triangle Publications, supra,* 445 F. Supp. 880:

> The fluidity built into the statute was designed to diminish the difficulty which arises when an innovation in technology makes possible new techniques of display that could not have been contemplated by the legislators in the year the statute was framed.

The fair use doctrine, thus, is the statutory mechanism to use in cases such as this one, where "technological change has rendered the Copyright Act's terms ambiguous," and thus where the Act "must be construed in light of its basic purpose" to encourage creativity. *Twentieth Century Music Corp. v. Aiken, supra,* 422 U.S. at 156.

When applied to this case, the criteria listed in Section 107 of the Copyright Act clearly indicate that time-shifting is a fair use of Respondents' copyrighted broadcast programming.* First, the "purpose" of time-shifting is simply to obtain access to programs that Respondents themselves make available for free

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*Although four factors used in determining whether a use is "fair" are set forth in section 107, a finding of fair use is not dependent upon the meeting of these criteria, but is to be determined upon the specific facts of each case. *Meeropol v. Nizer,* 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978). The statute does not pretend to present an exhaustive list of potentially fair uses. It states only that the factors to be taken into account when determining whether a use is fair "shall include" the considerations listed therein. 17 U.S.C. §107. As the House Report on the Copyright Act stated in this regard:

> [T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. . . . [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66; *see also* S.Rep. No. 94-473, 94th Cong., 1st Sess. 62. Similarly, the Senate Report states:

> [N]ew conditions arising in the future may alter the balance of equities. It is also important to emphasize the singling out of some instances to discuss in the context of fair use is not intended to indicate that other activities will or will not be beyond fair use.

S. Rep. No. 94-473, 94th Cong., 1st Sess. 63.

viewing.* There is no commercial exploitation of Respondents' works,** there is not even a secondary release to the public. The legislative history of Section 107 specifically notes in this regard that "the commercial and non-profit character of an activity, while not conclusive to fair use, can and should be weighed along with the other factors in fair use decisions." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66.

The second consideration of fair use listed in section 107, the "nature of the copyrighted work," was primarily relied upon in the above-described cases but is not directly relevant in its classic sense in this case. Traditionally, consideration of the "nature" of the programming looked to the substance or "newsworthiness" of the program. However, VCRs are used to record *all* types of programming. In addition to the "Chip and Dale/Mixed Nuts" cartoon noted by the Ninth Circuit, VCRs record political, educational, religious, sports, and many other

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*Contrary to the Ninth Circuit's impression, the fair use doctrine is applicable to other than scholarly uses of copyrighted material. *See, e.g., Wainwright Securities, supra* note p. 7, 558 F.2d 91 (fair use doctrine applicable to commercial index of plaintiff's works); *Berlin v. E.C. Publications, supra* note p. 22, 329 F.2d 541 (doctrine applicable to Mad Magazine parody).

**Even if the time-shifted recordings were sold commercially, this would not preempt a finding of their recording being a "fair use." As stated by the court in *New York Times, supra* note p. 7:

> While whether the alleged infringer seeks financial gain from its use is a factor to be considered, the fact that defendants seek to profit financially will not preclude their use from being a fair use.

434 F. Supp. at 221 (citations omitted). Similarly, in *Rosemont, supra*, note p. 7, the court stated:

> Whether an author or publisher reaps economic benefits from the sale of [a work], or whether its publication is motivated in part by a desire for commercial gain . . . has no bearing on whether a public benefit may be derived from such a work.

366 F.2d at 307. *See also Triangle Publications, supra* note p. 7, 626 F.2d at 1175 ("Clearly, §107 makes commercial motive relevant to fair use analysis. But it is certainly not decisive."); and *Meeropol v. Nizer*, 361 F. Supp. 1063, 1068 (S.D.N.Y. 1973) ("The [copies'] commercial success, however, is no reason to conclude that it should be denied the benefits of the fair use doctrine.").

types of programming and information. *See* text, *supra* at 2, 9. This criterion, therefore, is not helpful in this case when reviewed in its classic sense, although it assuredly does not undercut a finding that VCR recording is fair use of programming in general.

When analyzed in a more modern sense, however, the "nature" of the programming recorded by VCRs in this case indicates that time-shifting is, in fact, a fair use. The "nature" of the programming in this case is that it is voluntarily broadcast into the home for the specific purpose of having it viewed by the greatest number of individuals. The fact that viewers use new technology to accomplish the viewing intended by Respondents, only at a later time, should not subject them to copyright infringement liability, especially when Respondents have no control over when the program is broadcast initially. As the Court stated in *Teleprompter, supra*, 415 U.S. at 408:

> The privilege of receiving broadcast electronic signals and converting them into the sights and sounds of the program inheres in all members of the public that have the means of doing so.

VCRs do no more than simple television sets in this regard; they simply allow reception and viewing by the public of broadcast information. Respondents cannot be allowed to increase their returns simply by limiting the public's access to VCRs, anymore than they could deny access to their programs by any person who did not own a television receiver at the time the program was produced. The fact that viewers now have a new means of gaining access to the programs does not lead to their being guilty of copyright infringement, especially when, as discussed earlier, the copyright holders are compensated for the additional viewers.

The third criterion of fair use, the "substantiality" of the challenged recording, graphically illustrates the inapplicability of the print-media precedents relied upon by the Ninth Circuit. The court noted in this regard simply, although accurately, that VCR owners usually record the entirety of programs, and concluded that this factor therefore undercut a finding that time-shifting was "fair use." Pet. App. at 21-22. However, as the only

other case concerning fair use ever to be addressed by this Court established, the fact that the entirety of a copyrighted work is used does not necessarily indicate that the copying is not a fair use. *Williams & Wilkins v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided court*, 420 U.S. 376 (1975) (copying by the National Institutes of Health of the entirety of copyrighted medical articles was a "fair use"). The court in *New York Times, supra*, 434 F.Supp. at 222, stated in this regard:

> Although the quantum of material taken from the copyrighted work must be considered, a bald quantitative approach is not determinative. While the taking of as little as three sentences has been held to constitute an infringement . . ., the copying of an entire work has been held to be a fair use . . . . The inadequacy of a pure quantitative approach obviously results from the fact that the quantum of appropriated material must be interrelated with a number of other factors, such as the quality and substantiality of the appropriated material, the need to use the appropriated material in the manufacture of defendants' product, and the other factors discussed herein [citations omitted].*

In this case, the principal factor taken into account under this criterion should have been the temporary nature of the typical use made of Respondents' works by VCR owners. As stated above, when time-shifting, VCR owners watch a recorded program only once or twice within a few days after recording, and then effectively destroy the copy by recording new material on the same tape. Although the entire work is normally copied, the short term of the copy's lifespan in this case indicates that this use of VCRs is not "substantial" within the meaning of section 107, because the recording will not generally be available

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*To paraphrase this Court in *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 397 (1968): "[M]ere quantitative [analysis] cannot be the proper test to determine copyright liability in the context of television broadcasting. . . . Rather, resolution of the issue before us depends upon a determination of the function that [a VCR] plays in the total process of television broadcasting and reception."

for viewing at the time the program is rebroadcast by the Respondents,* which might not occur until *years* later. Pet. App. at 36-39.

The final consideration mentioned in section 107, the economic harm imposed on the Respondents by VCR copying, generally has been considered to be the principal consideration of fair use. Denicola, *Copyright and Free Speech–Constitutional Limitation on the Protection of Expression*, 67 Cal. L. Rev. 283 (1979).** In this case, the final consideration clearly indicates that time-shifting is a fair use of Respondents' works.

Initially, the district court specifically found, and the court of appeals failed to reject as "clearly erroneous," Fed. R. Civ. Pro. 52 (a), that Respondents "have conceded that neither the sale nor use of Betamax or Betamax tapes had by the time of trial caused [Respondents] any measurable monetary damage, economic loss or revenue loss," Pet. App. at 50, nor were Respondents able "to predict at what point in either time or in Betamax sales such harm would occur," *id.* As this Court recently has restated, an appellate court cannot substitute its view of the facts for the district court's unless it is left with a "definite and firm conviction that an error has been committed." *Inwood Laboratories v. Ives Laboratories*, 50 U.S.L.W. 4592, 4595 (June 1, 1982); *see also United States v. Real Estate Boards*, 339 U.S. 485, 495 (1950); *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948). Because the district court found in this case that no economic harm to Respondents has resulted from VCR copying, and that Respondents have failed to

*The legislative history of the Copyright Act notes that whether a written work is out of print is relevant in determining whether the copying of that work would be a "fair use." S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975). In the instant case, the fleeting character of broadcast transmissions is analogous to a printed work being out of print. If the viewer is not fortunate enough to be at home in front of his television receiver when the program is broadcast, he has no opportunity to view that program. The indication that Congress did not intend this restraint to apply to readers of printed material supports the conclusion that Congress would not have intended to impose the same restraint on viewers of broadcast programs.

**Regardless of the economic impact of the copying on the copyright holder, however, Denicola concludes: "Where the objectives of free speech require access to the expressions of another, the property interest created by copyright law must yield." Denicola, *supra* note p. 7 at 303.

establish that economic harm to them would result, the district court's finding on this criterion is conclusive.

Additionally, as stated above, Respondents are compensated for the additional viewers who obtain access to Respondent's programs via VCR time-shifting. The increased audience proportionately increases the licensing fees they obtain from the broadcasters. *Teleprompter, supra*, 415 U.S. at 412. Therefore, no economic harm to Respondents results from VCR recording of their work for time-shifting purposes.* Consequently, such time-shifting should be considered a fair use of Respondent's copyrighted work.

In short, the use of VCRs to time-shift is directly analogous to the use of cable systems which were found not to violate the Copyright Act in *Fortnightly, supra*, and *Teleprompter, supra*. A VCR "no more than enhances the viewer's capacity to receive the broadcaster's signal . . . . The basic function [VCRs] serve is little different from that served by the equipment generally furnished by a television viewer." *Fortnightly, supra*, 392 U.S. at 399 (footnote omitted). Consequently, time-shifting by VCRs should not be considered a violation of Respondents' copyrights. To hold otherwise would deny the public's access to the same programming which the Copyright Act seeks to promote.

If, for any reason, the Court decides that time-shifting is not a "fair use" within the terms of section 107, time-shifting

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*In fact, as noted in *Teleprompter, supra* note p. 10 at 412, and *Meeropol, supra* note p. 24, 361 F. Supp. at 1068, the increased audiences for Respondents' programs resulting from VCR taping, which is taken into account in "rating" those programs by Nielsen and Arbitron, should result in *increased* revenues to Respondents.

The Ninth Circuit erroneously assumed that Respondents were economically harmed in this case simply because viewers were willing to pay for VCRs. The fact that the viewing of programs has value, however, does not establish that Respondents were economically injured when that value is passed along to the Respondents in the form of their receiving greater licensing fees from the broadcasters. The CATV system subscribers in *Teleprompter, supra*, and *Fortnightly, supra*, also paid for the services they received, but that did not inhibit the Court from finding that the re-transmission of broadcast signals by CATV systems did not infringe the copyrights at issue in that case.

nevertheless should be allowed because it is an activity protected by the First Amendment and no compelling interest has been established in this case which cannot be (and is not being) met by reasonably available alternatives.* As the court stated in *Triangle Publications, supra*, 445 F. Supp. at 882:

> When the Copyright Act and the First Amendment both seek the same objective, their future coexistence is easily assured. However, when they operate at cross-purposes, the primacy of the First Amendment mandates that the Copyright Act be deprived of effectuation.

The Respondents are compensated for the viewers given access by time-shifting, and thus there is no copyright interest to weigh against the viewers' First Amendment right to have access to broadcast information. Moreover, as time-shifting is the principal use of VCRs, any copyright interest applying to the repeated viewing resulting from the creation of tape libraries must be remedied through a more limited means than the general prohibition of all VCR recording, the imposition of a generally applicable "compulsory license," or the imposition of statutory damages which will be passed down to the viewers. Legal prohibitions specifically aimed at librarying,** or the development of videotape cassettes which would not maintain the quality of recordings over repeated viewings or past a relatively short period of time, both are reasonably available and more limited means of securing the Copyright Act's policies with regard to librarying. To the limited extent librarying will occur despite these restrictions, it is one of the "noxious branches" that must be tolerated to avoid "pruning away the vigors" of the First Amendment. Madison, Reports on the Virginia Resolutions, *Madison's Works*, Vol. 4 at 544.

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*Professor Nimmer noted that if a publication was to be allowed despite the infringement of another's copyright, the publication should be allowed directly pursuant to the First Amendment and not under the doctrine of fair use because the exception would be applicable even when the marketability of the copyright holders' work would be affected. *Nimmer, supra* note p. 7 at 1200-01.

**Wrongful conduct "can be prohibited and the penal laws used to punish such conduct directly." *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620, 637 (1980).

CONCLUSION

For each and all of the foregoing reasons, the judgment and opinion of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

SIDNEY A. DIAMOND
(Counsel of Record)
GRIER CURRAN RACLIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Attorneys for *Amici Curiae*

Minnesota Mining and Manufacturing Company, Maxell America, Inc., and Tandy Corporation

Of Counsel:

Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Amicus Brief

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No. 81-1687

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SONY CORPORATION OF AMERICA, et al.,
Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for the States of Missouri, Alabama, [redacted] Arkansas, Georgia, Hawaii, Illinois, Iowa, Louisiana, Mississippi, Montana, North Carolina, Ohio, Oklahoma, Rhode Island, Vermont, Virginia and Wisconsin as Amici Curiae in Support of Petitioners Sony Corporation of America, et al.

KELLY 1 4169

JOHN ASHCROFT
Attorney General of Missouri
P. O. Box 899
Jefferson City, MO 65102
314/751-3321

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JURISDICTIONAL STATEMENT

This Honorable Court has granted the petition of Sony Corporation of America, et al., for a Writ of Certiorari. This brief, *amicus curiae*, respectfully is submitted by the State of Missouri and by John Ashcroft, its Attorney General, pursuant to Rule 36.4 of this Court.

The states and attorneys' general listed in footnote 1 accept and agree with the positions and arguments expressed herein.[1]

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[1] *Amici* Attorneys General

The Honorable Charles A. Graddick
Attorney General of Alabama
State Administrative Building
Montgomery, Alabama 36130

The Honorable John Steven Clark
Attorney General of Arkansas
Justice Building
Little Rock, Arkansas 72201

The Honorable Michael J. Bowers
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

The Honorable Tany S. Hong
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

The Honorable Tyrone C. Fahner
Attorney General of Illinois
500 South Second
Springfield, Illinois 62701

The Honorable Thomas J. Miller
Attorney General of Iowa
Hoover Building, Second Floor
Des Moines, Iowa 50319

The Honorable William J. Guste, Jr.
Attorney General of Louisiana
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

(Continued on next page)

Footnote continued

The Honorable William A. Allain
Attorney General of Mississippi
P. O Box 220
Jackson, Mississippi 39205

The Honorable Michael T. Greely
Attorney General of Montana
State Capitol
Helena, Montana 59601

The Honorable Rufus L. Edmisten
Attorney General of North Carolina
P. O. Box 629
Raleigh, North Carolina 27602

The Honorable William J. Brown
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215

The Honorable Jan Eric Cartwright
Attorney General of Oklahoma
Room 112, State Capitol
Oklahoma City, Oklahoma 73105

The Honorable Dennis J. Roberts II
Attorney General of Rhode Island
Providence County Courthouse
Providence, Rhode Island 02903

The Honorable John J. Easton
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vermont 05602

The Honorable Gerald L. Baliles
Attorney General of Virginia
101 N. 8th Street, 5th Floor
Richmond, Virginia 23219

The Honorable Bronson C. LaFollette
Attorney General of Wisconsin
P.O. Box 7857, State Capitol Bldg.
Madison, Wisconsin 53702

INTEREST OF AMICUS CURIAE

The State of Missouri is home to nearly five million persons, more than three million of whom reside in metropolitan areas, the remainder living in rural areas of the state. These five million Missourians live in approximately 1,791,270 households; over 98% of these households (approximately 1,760,200) are "television" households. Approximately 24,400 of these "television" households are also "videotape" households, i.e., they have home videotape recorders (VTRs).

There are twenty-two (22) commercial television stations and four (4) public/educational television stations currently licensed by the Federal Communications Commission (FCC) to broadcast within Missouri, over VHF and UHF assigned frequencies. Applications presently are pending before the FCC for additional broadcast licenses for new stations to operate over VHF and UHF frequencies in the state. Moreover, applications to the FCC for 46 low power (neighborhood or LPTV) television stations have been made by Missourians.

America is television oriented; Missourians, like their counterparts in the other 49 states, are television oriented. Television is no longer a luxury; it has become a necessity. Missouri's citizens rely upon this widely-accepted technological phenomenon not only for entertainment, but also for education, cultural enrichment and news. Television has become more than a source of these; it plays a role in shaping our society. Its broadcasts allow us to experience history, form the substance of coffee-klatch conversation, become the subjects of sermons and speeches, and provide instant commonality between strangers. Accessibility to the full range of television programming is an essential component of the well-rounded citizen. Videotaping enhances

accessibility to television programming; the use of videotape recorders contributes to the public welfare.

The district court below was confronted with the singular issue of whether any one or more of *only* 32 instances of off-the-air home recording, by *only* four individuals of commercial television entertainment-type programming licensed by only two copyright owners, was infringement. The district court's opinion was that none of these instances constituted a direct infringement (Pet. App. 34, 56, 115)—and, even more importantly, that there could have been no contributory infringement by those who supplied the videotaping equipment (here, the Betamax) (Pet. App. 34, 89, 115).

This very limited factual situation resulted in an opinion by the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") which far transcends the original issue and which affects millions of citizens of the United States, including citizens of the State of Missouri. The Court of Appeals' opinion ignores the facts of the case and makes generalized holdings that:

> (a) "we conclude that off-the-air copying of copyrighted audiovisual materials by owners of videotape recorders in their own homes for private noncommercial use, constitutes an infringement of appellants' copyrighted audiovisual materials." (Pet. App. 12—see also pp. 18, 27, 30.)
>
> (b) "Videotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Virtually all television programming is copyrighted material. Therefore, videotape recorders are not 'suitable for substantial noninfringing use.'" (Pet. App. 25-6);

(c) "[Petitioners] are legally responsible for the infringing activity." (Pet. App. 30);

(d) "statutory damages may be appropriate. . . . The district court determined that an injunction would not be an appropriate remedy. . . . The court should reconsider this action." (Pet. App. 28).

The opinion thus holds that "*virtually all*" home video recording by Missouri citizens of free off-the-air television broadcasting is copyright infringement, imposes liability therefor on VTR suppliers, and indicates remedies (viz., mandatory statutory damages for each infringement, a discretionary injunction, or both) which, if imposed, will terminate home VTR availability. No citizen of Missouri, in fact no citizen of any state, was afforded an opportunity to have counsel and to be represented in any court below before this sweeping pronouncement of law was made.[2]

Subsequent to this opinion, and as an opening salvo in what has developed into an obvious attempt to extend the opinion to bar off-the-air *radio* audio recording, the president of the Record Industry Association of America, Inc. announced: "There is no legal immunity for home audio taping in the current copyright law. There is no immunity for home audio taping in any of the statutory exemptions, or anywhere else in the 1976 [copyright] act or its legislative history."[3] *The Washington Post*, December 15, 1981.

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[2]Defendant Griffiths was the only VTR owner named as a party in the proceedings below. He never appeared as a party, he never had counsel, and respondents waived all claims against him for legal relief (Pet. App. 43-44; Tr. A88, A158-9).

[3]In contrast, the same man told Congress in 1971, when the sound recording provisions of the 1976 Copyright Revision Act were being given advance consideration and implementation:

(Continued on next page)

This case threatens the citizens of Missouri with a loss of their ability to home record at all; not only would the Ninth Circuit's opinion, if upheld, potentially bar recording of free off-the-air television programming, it may also, indirectly, bar recording of audio programming broadcast over radio.

Although petitioners have some interests in common with your *amicus,* your *amicus* believes it best can represent the interest of the citizens of the State of Missouri in preserving their fundamental and traditional personal right to home record from free off-the-air television for subsequent private family viewing at home.

Footnote continued

"[T]he pirate also argues that granting a copyright may raise questions about the individual who in his home may duplicate a commercial performance on home-recording equipment. We in the industry certainly have known that such amateur practices go on in the home, and we realistically recognize that no such enforcement is possible, and certainly none is intended." (Hearings before Subcommittee No. 3 of the House Judiciary Comm., 92nd Cong., 1st Sess. on S. 646 and H.R. 6927, June 9 and 10, 1971, p. 26).

SUMMARY OF ARGUMENT

Since the advent of public off-the-air broadcasting in the United States in 1920, both radio and television broadcasting have been the profitable *privilege* of a few, whereas free reception and use of such broadcasts by all Americans, including Missourians, in the privacy of their homes has been an absolute *right*—an American heritage. The home VTR is one "means" of such reception. Clearly, home recording of respondents' programming should not be infringement since the home VTR is merely a "means" of "receiving" a program which has been broadcast "for the use of the general public."

It appears that the owners of most television programming consent to home reception with VTRs; out of all broadcasters, advertisers and program owners, only two owners of television programming (viz., respondents) ever have brought an action to stop home recording—and one of these now says it would not do so again. Respondents, seemingly aberrants within the industry, are participating voluntarily in the privilege and profits of broadcasting. In the course of so doing, they should not be allowed to use their copyrights to arrest "the Progress of Science" and to dictate to Missourians that no television programming whatsoever may be received by means of a home VTR.

ARGUMENT

1. *VTR Serves the Longstanding Public Policy of Free Off-The-Air Radio and Television Broadcasting*

Federal regulation involving the air waves began with the Wireless Ship Act of 1910 (36 Stat. 629); soon thereafter, the Radio Act of 1912 (37 Stat. 302) forbade any radio broadcasting without a license from the Secretary of Commerce and Labor, but gave the Secretary no power to regulate the broadcast frequency, power or hours of operation of a licensee and no power to limit the number of licenses notwithstanding limited available frequencies (see *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 210-4 (1942)).

Radio station KDKA, established by Westinghouse in East Pittsburgh on November 2, 1920, was the first commercial radio broadcasting station in the United States and probably in the world (see *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 158 n.9 (1975); *The Radio Industry*, Harvard Graduate School of Business Administration Lectures, 1927-28). Its initial broadcast was returns of the Harding presidential election; thereafter, its early programming was drawn largely from musical phonograph records, soon augmented by live bands and orchestras, religious services, political addresses and conventions, news, sports, theatrical programs, opera, weather forecasts, livestock and grain reports, and educational pick-ups from schools and universities.[4] KDKA, several other stations that commenced broadcasting soon thereafter, was financed by a manufacturer of home radio receivers so as to promote the sale of receivers.

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[4]*The Radio Industry*, *supra*, pp. 189-225.

Station WEAF in New York City, established in 1922 by the American Telephone & Telegraph Company, inaugurated a different kind of broadcast station financing called "toll broadcasting." Under the toll broadcasting plan, broadcast facilities were supported financially by being made available for short periods of time (analogously to telephone facilities) to those who sponsored programming (often good music) interspersed with "courtesy" announcements (forerunners of the commercial).[5] From the outset of public radio in the United States, no matter the mode or motivation of broadcasting financing, *reception* of the broadcasts has been free.

By 1926, there were more radio stations than available frequencies, stations used any frequency and power they desired, and the result was interference, confusion and chaos. Consequently, Congress enacted the first comprehensive scheme of control over radio transmission and communication within and between the states by the Radio Act of February 23, 1927 (44 Stat. 1162). That jurisdiction over radio, and later over television, has continued to date under the Federal Communications Act of June 19, 1934 (47 U.S.C. Section 301 *et seq.;* 48 Stat. 1081 *et seq.*).

Commercial television broadcasting in the United States commenced in 1941 (six stations), was stagnated by World War II, and resumed in 1948 using VHF channels. The first commercial UHF station commenced broadcasting in 1952—the first public-educational station began broadcasting in 1953.

Following the radio precedent, early commercial tele-

---

[5]In contrast, most European nations finance broadcasting by an excise tax on receivers. J. Greenfield, *Television, The First 50 Years* (1977).

vision programs were sponsored, and often supplied, by a single advertiser (e.g., The Kraft Television Theater). Most programming, local and network, necessarily was "live." The videotape recorder (VTR) was first utilized to tape live programs for delayed broadcast in 1956; in fact, Sony received an Emmy from the National Academy of Television Arts and Sciences for "outstanding achievement in engineering development for the U-Matic (VTR) video cassette concept."

In the mid-1950's, NBC initiated segmented sponsorship—which enabled several different advertisers to finance a single program, generally originated by the broadcaster or licensed from someone else. ABC was the first to involve the major movie studios in the production of routine prime-time programming (Disney in 1954, Warner Brothers in 1955).[6] During the 1950's, for the most part, the motion picture industry resisted television and released only its pre-1948 feature films for television broadcasting.

47 U.S.C. Section 303(g) spells out our country's policy to "generally encourage the larger and more effective use of radio [including television] in the public interest." Under Sections 307(a), 309(a) (as under Sections 9, 11 of the Radio Act), public radio and television broadcast stations are licensed for the purpose of serving "the public interest, convenience and necessity." The Third Annual Report of the Federal Radio Commission (p. 32) said:

> Broadcasting stations are licensed to serve the public and not for the purpose of furthering private or

---

[6]S. Head, *Broadcasting in America: a Survey of Television and Radio*, 4th ed. (1982); L. Bogart, *The Age of Television*, 3d ed. (1972); W. Emery, *Broadcasting and Government: Responsibilities and Regulations* (1961).

selfish interests of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this.

"[B]roadcasting is subject to an inherent physical limitation. Broadcasting frequencies are a scarce resource; they must be portioned out among applicants." (*Columbia Broadcasting* v. *Democratic Comm.*, 412 U.S. 94, 101 (1973)). "No one has a First Amendment right to a license or to monopolize a radio frequency . . . ; licensees (are] given the privilege of using scarce radio frequencies as proxies for the entire community. . . ." (*Red Lion Broadcast Co.* v. *FCC*, 395 U.S. 367, 389, 394 (1969).

Although those who *broadcast* do so as a *privilege*, Missourians have a *right* to *receive* such broadcasts which approaches a First Amendment right—especially when received in the privacy of their homes. The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech. . . ." and this Court repeatedly has held that the freedom of speech guaranteed by the First Amendment "necessarily protects the right to receive" communications. *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-3 (1972); see also *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756-7 (1976). Furthermore, "a man's home is his castle." (*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 66 (1973)).

In Red Lion, supra, p. 390, this Court said:

> . . . the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. . . . It is the right of the people to receive suitable access to social, political, esthetic, moral and other ideas and experience which is crucial here. That right may not constitutionally be

abridged either by Congress or by the FCC."

As stated by this Court in *Fortnightly Corp.* v. *United Artists,* 392 U.S. 390, 397-8 (1968):

> Television viewing results from combined activity by broadcasters and viewers. Both play active and indispensable roles in the process. . . . The broadcaster . . . converts the visible images and audible sounds of the program into electronic signals, and broadcasts the signals at radio frequency for public reception. Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert them into the visible images and audible sounds of the program. The effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer."

This Court further said, both in *Fortnightly, supra,* p. 400, and in *Teleprompter Corp.* v. *CBS,* 415 U.S. 394, 410 (1974), that television programming, once broadcast, has been "released to the public"; and in *Teleprompter, supra,* added that once the television program is broadcast, the broadcaster and the program owner have "no control over the segment of the population which may view the program" (p. 412), and that, "The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so." (p. 408).

Like the cable systems in *Fortnightly* and *Teleprompter,* home VTRs "enhance the viewer's capacity to receive the broadcaster's signals" (*Teleprompter, supra,* p. 401). The radio and television set enabled reception and contemporaneous listing and/or listening and viewing. Tape recorders are "time machines" enabling reception and

delayed or *time-shift* listening/viewing—as tools which expand the ability of a person to receive a broadcast they are a boon to the public for reception just as they are to broadcasters for broadcasting.

Television programming in Missouri includes news, weather reports, current events, documentaries, talk shows (national and local), sports, religious, educational and instructional, market reports, children's programs—as well as entertainment.

The people of the State of Missouri include both urban and rural residents, all of whom have an interest in free off-the-air television programming. Many Missourians are employed (or otherwise unavailable) at the time of broadcasts which they want to see and which their status as informed citizens demands that they see (e.g., farmers need weather and market reports but their free time from work frequently does not coincide with television broadcast schedules; night shift workers are entitled to keep current with the rest of the nation as to prime time broadcasting even if they have to view it the next day; etc.) The home VTR furthers the public's "interest, convenience, and necessity" by enabling persons to see programming which they otherwise would have to miss.

Respondents (and their *amici curiae* studios) were not contributors to "the Progress of Science" which brought free television (and radio) to the American public. However, respondents capitalized on television once it was established.

By commercially exploiting their works in public broadcasting, respondents voluntarily are participating in, and profiting handsomely from, the broadcaster's "privilege." Respondents' concurrent effort's to use their copyrights to limit the "means" utilized by Missourians in the

privacy of their homes to exercise their "right" to receive public broadcasts are in derogation of "the Progress of Science," the First Amendment and the larger and more effective use of radio and television.

The federal law always has provided for free reception and viewing of radio and television programs which are "broadcast . . . for the use of the general public" (47 U.S.C. Section 605, Section 27 of the Radio Act). Never has the law limited the means of public reception; never has the law required listening or viewing by the public to be simultaneous with the broadcast.

2. *Most of-The-Air Television Broadcasts Are Available for Unchallenged Home Recording*

Evidence at the trial of this action showed both professional and amateur sports broadcasts available for home VTR reception with the owners' consent—and showed that 49% of VTR owners record sports broadcasts.

Evidence showed religious programming available for home VTR reception with the owners' consent—and showed that 10% of VTR owners record religious broadcasts.

Evidence showed educational programming available for home VTR reception with the owners' consent—and showed that 63% of VTR owners record educational programming.

Evidence showed that 42% of home VTR owners record National Broadcasting Company programs—and showed that NBC's parent corporation, RCA, markets VTRs.[7]

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[7]The American Broadcasting Company has announced "Home View Network" over its owned and affiliated stations—early morning broadcasts intended specifically for home recording and later viewing. *The Washington Post*, April 30, 1982; *The Wall Street Journal*, April 30, 1982.

Evidence showed that 74% of home VTR owners record local programming (news, documentaries, public events)—and showed that broadcast stations erase most of their local programming without even registering it for copyright.

A "Home Video" study prepared for the FCC dated 1 November 1979 synopsized "five major studies of VCR use," finding "it is clear that the principal use of the VCR to date is for time-shift viewing." Also, "because rating services are prepared to report such time-shifting, broadcasters should actually be helped by this consumer convenience. An audience that was previously unavailable to them is now viewing, and the viewing is properly attributed in audience reports. . . . Most [playback] occurs relatively quickly after the recording (almost all within a week). Most of such recordings are viewed only once (usually only by members of that household). . . ." (pp. 61-62).

A March 15, 1980, report prepared for the Corporation for Public Broadcasting showed home recording from Public Broadcasting Service (PBS) stations was highest during fringe-time periods (the three hours before prime time) when *MacNeil/Lehrer, Washington Week, Wall Street Week,* etc., were broadcast. At least 68% of PBS recordings is played back within two days. (Respondents' programming does not appear on PBS.)

The 1976 Act specifically authorizes some non-infringing off-the-air VTR usages by educators and libraries—17 U.S.C. Section 108(h), 118(d)(3). Respondent Universal expressly has acknowledged some non-infringing off-the-air VTR usage in the educational area (127 Cong. Rec. No. 145, E4751, daily ed. October 14, 1981).

The significance of the foregoing is unmistakable. To-

day's free off-the-air television broadcasting (some copyrighted, some not) is comprised substantially, in fact primarily, of programming whose owners consent to home recording by Missourians.[8]

3. *This Action Shows No Justification for Preventing Home-Use Recording of Free Off-The-Air TV*

The district court found, based on uncontroverted evidence, that the home VTR is a "staple item of commerce,"[9] used for purposes where no infringement could be alleged (e.g., recording material which is not copyrighted or where permission to record is given)" (Pet. App. 92, 106-7). The Court of Appeals' contrary and arbitrary holding that "videotape recorders are not "suitable for substantial noninfringing use' " (Pet. App. 26) is untenable if the accepted and usual course of judicial proceedings is to be followed.

If home VTR suppliers are held liable for infringing home-use recording which they cannot control (the district court found and common sense makes obvious, that petitioners "have neither the right nor the ability to control Betamax purchasers' use of the machines in their home"—Pet. App. 98), they cannot be expected to supply VTRs for any purpose.

The evidence showed only time-shift usage of the

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[8]The Court of Appeal's statement that "Virtually all television programming is copyrighted material" (Pet. App. 26) is both erroneous and irrelevant.

[9]The consequence of this finding presumably is that the mere manufacture, distribution, sale or advertisement of such an item, *per se*, cannot constitute contributory infringement when that item is used by the consumer for patent or copyright infringement. 35 U.S.C. Section 271(c); *Dawson Chemical Co.* v. *Rohm & Hass Co.*, 448 U.S. 176 (1980); *Henry* v. *A. B. Dick Co.*, 224 U.S. 1, 48 (1912), overruled on other grounds by *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917).

Betamax home VTR with respect to respondents' works[10]—and no damage. For many Missourians, the "recording" (which respondents say constitutes the infringement) is a necessary mechanical step (ergo, a "fair use") in the only reception process which ultimately will enable them to view at home the program which the broadcaster intended them to view. In fact, respondents well could be deemed to have consented to such usage of their copyrighted works when they elected to exploit them on free television. Home viewing by anyone and everyone within range of his signal is exactly what the broadcaster intended; and, when all is said and done, nothing more occurs with home VTR usage. But even assuming *arguendo* that home recording of respondents' works were infringement the price of depriving the public of home VTRs for any purpose[11] in order to prevent home recording of respondents' works is far too high—as well as legally unjustifiable.

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[10]This *amicus curiae* brief is directed only to home VTR time-shift usage. This case does not involve commercial expropriation, or piracy, of any work and this brief manifestly does not condone such.

[11]There is no doubt about respondents' goal to obtain and use an injunction in order to terminate, or control, all home VTR recording by Missourians. Respondents told the district court herein at the beginning of trial "that is really what this case is all about, that is, an injunction" (R.T. 70-1) and at the close of trial "Certainly at the very least we think that the Court should issue an injunction prohibiting the sale of Betamax" (R.T. 3278). The complaint in Universal's suit filed November 6, 1981 against 50 defendants, including the balance of VTR suppliers (No. 81-5723 FW, C.D. Cal.), prays "that an injunction issue against defendants . . . to protect [Universal's] copyrighted motion pictures from recording and copying on the aforesaid VTR's and video cassettes". The complaint in Universal's suit filed July 1, 1982 against petitioners herein, seeking a finding of contributory infringement as to *every* motion picture ever licensed by Universal to television (No. 82-3271 FW, C.D. Cal), likewise prays "That an injunction issue against [petitioners] . . . to protect [Universal's] copyrighted motion pictures from recording and copying on the aforesaid VTR's and videocassettes".

Respondent's obvious recourse is to seek a remedy against individual direct infringers (if such they be)[12]—but respondents have stated, separately and jointly, that they never will seek any relief against a consumer (Appendix 1 hereto). Since respondents refuse to help themselves, this Court should have little concern for their supposed plight.

[12]See *Encyclopedia Britannica Educational Corp.* v. *Crooks*, ____ F. Supp. ____ (W.D.N.Y. 1982).

CONCLUSION

Home-use VTRs were sold in the United States for ten years (1965-75) without objection from anyone before respondents brought this action. This action was commenced some six and one-half years ago and no other copyright owner has brought an infringement action against anyone for home recording. Respondent Disney has said publicly it would not do so again (Appendix 2 hereto). Like radio, free off-the-air TV is not "for private gain. . . . It is a public concern, impressed with a public trust, and to be considered primarliy from the standpoint of public interest. . . ." (2 Ann. Rept. Fed. Radio Comm. 168-9). This Court should not regard the economic motivations of one or two (or even several) owners of copyrighted entertainment-type programs as sufficient grounds to allow them to destroy Missourians' utilization of technological advances for the reception and use at home of limited radio and frequencies which were allotted long ago for the public's interest, convenience and necessity.

Respectfully submitted,

JOHN ASHCROFT
Attorney General of Missouri
P. O. Box 899
Jefferson City, Missouri 65102

CHARLES A. GRADDICK
Attorney General of Alabama
State Administrative Building
Montgomery, Alabama 36130

JOHN STEVEN CLARK
Attorney General of Arkansas
Justice Building
Little Rock, Arkansas 72201

MICHAEL J. BOWERS
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

TANY S. HONG
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

TYRONE C. FAHNER
Attorney General of Illinois
500 South Second
Springfield, Illinois 62701

THOMAS J. MILLER
Attorney General of Iowa
Hoover Building, Second Floor
Des Moines, Iowa 50319

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

WILLIAM A. ALLAIN
Attorney General of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

MICHAEL T. GREELY
Attorney General of Montana
State Capitol
Helena, Montana 59601

RUFUS L. EDMISTEN
Attorney General of North Carolina
Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

WILLIAM J. BROWN
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma
Room 112, State Capitol
Oklahoma City, Oklahoma 73105

DENNIS J. ROBERTS II
Attorney General of Rhode Island
Providence County Courthouse
Providence, Rhode Island 02903

JOHN J. EASTON
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vermont 05602

GERALD L. BALILES
Attorney General of Virginia
101 N. 8th Street, 5th Floor
Richmond, Virginia 23219

BRONSON C. LAFOLLETTE
Attorney General of Wisconsin
P. O. Box 7857, State Capitol Bldg.
Madison, Wisconsin 53702

Amicus Brief

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AMICUS CURIAE, IN SUPPORT OF AFFIRMANCE

RICHARD M. COOPER
(Counsel of Record)
ELLEN S. HUVELLE
NANCY F. PREISS
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-3017
Attorneys for Motion Picture Association of America, Inc., Amicus Curiae

BARBARA SCOTT
WILLIAM NIX
Motion Picture Association of America, Inc.
525 Fifth Avenue
New York, N.Y. 10036
Of Counsel

Date: October 27, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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---

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AMICUS CURIAE, IN SUPPORT OF AFFIRMANCE

The Motion Picture Association of America, Inc., *amicus curiae*, submits this brief in support of affirmance of the decision of the United States Court of Appeals for the Ninth Circuit in this case, 659 F.2d 963 (9th Cir. 1981), and in support of the position of respondents, Universal Studios, Inc. and Walt Disney Productions. Written consent of all parties to the filing of *amicus* briefs is on file with the Clerk of the Court.

INTEREST OF THE AMICUS

The Motion Picture Association of America, Inc. is a not-for-profit corporation, organized under the laws of the State of New York, whose purposes include the fostering of the common interests of those engaged in the motion picture industry in the United States. The Association

represents the major producers and/or distributors of motion pictures in the United States.

The members of the Association frequently license their products to pay television, television networks, and local stations. When broadcast, such productions are vulnerable to being copied on video tape recorders ("VTRs").

Some (though not all) of the members of the Association are joining individually with certain other firms in a separate *amicus* brief.

SUMMARY OF ARGUMENT

For more than 250 years Anglo-American law has recognized that substantial copying of a protected work is unlawful except for the purpose of making a new original work. Home videocopying of televised works protected by copyright involves no creative effort by the copyist and therefore cannot be fair use under the case law or under 17 U.S.C. § 107. Neither the First Amendment nor the Communications Act of 1934 provides any reason to stretch the doctrine of fair use to cover the facts of this case.

Petitioners are liable as joint direct infringers because they induced widespread infringement. They are also liable as contributory infringers because they supplied the indispensable tools for the infringement (VTRs and blank tapes) with knowledge to a moral certainty that those tools would be used for widespread infringement. The "staple article of commerce" doctrine in patent law provides no defense. A finding that petitioners are liable will not doom VTR technology.

The Motion Picture Association has never acquiesced in the view that home videocopying is a fair use. An argument to the contrary in one of the *amicus* briefs is mistaken.

I. NON-CREATIVE COPYING OF COPYRIGHTED TELEVISION PROGRAMS AND FILMS IN THE HOME IS NOT A FAIR USE.

The doctrine of "fair use" was developed in case law, and codified in § 107 of the 1976 Copyright Act, 17 U.S.C. § 107. The statute was intended to endorse the prior doctrine, not to enlarge it, narrow it, or otherwise change it.[1] Therefore, the prior case law remains controlling. As shaped by those cases, the doctrine is not the equitable free-for-all that petitioners contend it is, but rather is a coherent set of legal principles crafted over more than 250 years and reflecting the English and American judges' accumulated understanding of the interests at stake.

A standard definition of "fair use" is the "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner."[2] The doctrine comes into play only where there has been a substantial similarity in expression. 3 Nimmer on Copyright § 13.05[A] at 13-56 (1981).

The purpose of the privilege is the purpose of the law of copyright: "To Promote the Progress of Science," U.S. Const. art. 1, § 8, cl. 8. *Rosemont Enterprises* v. *Random House, Inc., supra,* 366 F.2d at 307; *Iowa State University Research Foundation* v. *American Broadcasting Companies,* 621 F.2d 57, 60 (2d Cir. 1980). *See also Sayre* v. *Moore,* 1 East 361, 362, 102 Eng. Rep. 139, 140 (K.B. 1785) (Mansfield, C. J.). As the claimant to copy-

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[1] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976) (hereinafter cited as "H.R. Rep."); S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1976) (hereinafter cited as "S. Rep.").

[2] *Rosemont Enterprises* v. *Random House, Inc.,* 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967), *quoting* Ball, The Law of Copyright and Literary Property 260 (1944).

right must be, in the constitutional sense, an "Author,"[3] so must the counter-claimant to the privilege of fair use be an "Author," and not *merely* a copyist. The doctrine is one of "fair *use*," not "fair copying." A fair use may amount to parasitism,[4] but it may not be mere cloning.

In the early cases under the first English copyright law, 8 Anne c.19 (1709), the judges looked "not so much to what the defendant had taken as to what he had added or contributed." Kaplan 17. So strong was the emphasis on independent creation that it was debated whether it might be not only necessary for a successful defense, but also sufficient.[5] The upshot was that independent creation was not in all cases a *sufficient* defense for substantial copying, Kaplan 17-22, but it was never doubted that it was *necessary* for a defense.

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[3] The Copyright and Patent Clause reads in full: "To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the Exclusive Right to their respective Writings and discoveries." *See also* 3 Nimmer on Copyright § 1.06[A] (1981).

[4] B. Kaplan, *An Unhurried View of Copyright* 57 (1967) (hereinafter cited as "Kaplan").

[5] Professor Chafee commented in *Reflections on the Law of Copyright: I*, 45 Colum. L. Rev. 503, 511-12 (1945): (footnote omitted) (hereinafter cited as "Chafee"):

> In the late eighteenth century, this ideal of the encouragement of independent creation was pushed so far as to allow translations and abridgments without the author's consent, on the ground that the new man had put in a great deal of his own work. Thus Lord Apsley, backed by Blackstone, gave immunity to an abridgment of Hawksworth's *Voyages*, calling it "a new and meritorious work," less expensive and more convenient to handle than the original; he said it could be read in a quarter of the time with all the substance preserved in language as good as Hawksworth's or better and in a more agreeable and useful manner. This sort of reasoning made Dr. Johnson's blood boil. During the *Tour to the Hebrides*, Boswell mentioned Lord Monboddo's opinion, that if a man could get a

In *Folsom* v. *Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901), Justice Story laid down for American law that the privilege is earned by "intellectual labor and judgment . . .; and not merely the facile use of the scissors." [6] In *Lawrence* v. *Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136), Justice Clifford characterized fair use as a "privilege allowed by law to a subsequent writer." He referred with approval to the English doctrine that the innocence of the copyist's intention would not be a defense "unless it appeared that the defendant had bestowed such mental labor upon what he had taken as to produce an original result." *Id.*

The theme that creative work is an indispensable element of fair use has been a leitmotiv in the cases.[7] In *Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420

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work by heart, he might print it, as by such an act "the mind is exercised."

> "Johnson. 'No, sir, a man's repeating it no more makes it his property than a man may sell a cow which he drives home.'
>
> "I said printing an abridgement of a work was allowed, which was only cutting the horns and tail off the cow.
>
> "Johnson. 'No, sir, 'tis making the cow have a calf.' "

Certainly this "exercise of the mind" test will not hold water. The author should not lose a large portion of his market so easily. Fortunately, our copyright law has abandoned its early tolerance of unauthorized abridgments and translations.

[6] Justice Story went on to identify other factors to be considered in fair use cases, which are strikingly similar to those listed in § 107. *See* 9 F. Cas. at 348.

[7] *See, e.g., Chautauqua School of Nursing* v. *National School of Nursing*, 238 F. 151, 153 (2d Cir. 1916); *College Entrance Book Co. v. Amsco Book Co.*, 119 F.2d 874, 876 (2d Cir. 1941); *Conde Nast Publications, Inc.* v. *Vogue School of Fashion Modelling*, 105 F. Supp. 325, 332-33 (S.D.N.Y. 1952); *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

U.S. 376 (1975), where photocopying by medical libraries was found to be a fair use, the court emphasized that the copying was for "scientific personnel *who need the material for their work*," 487 F.2d at 1355 (emphasis added), and that "medical science would be seriously hurt if such library photocopying were stopped," 487 F.2d at 1356.[8]

This emphasis on independent creative work is reflected in § 107, whose examples of fair use are "criticism, comment, news reporting, teaching, scholarship, or research. . . ." Each involves independent creative work. If a use is not of that character, the purpose of the doctrine is not served, and the doctrine does not apply.[9] Taping has no broader privilege than other forms of copying.[10]

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[8] *Williams & Wilkins* was an anomaly in that it was the only fair use case that approved systematic and multiple copying of entire articles where the copies would be free-standing entities, not necessarily incorporated into a derivative work. Even there, however, the circumstances of the copying were permeated by creative work of the most socially valuable kind, and of which the law of copyright has been particularly respectful. The copies were made for the sole purpose of facilitating further research. The libraries involved were professional libraries serving a community of researchers. Thus the purpose of the fair use doctrine was arguably served by judicial recognition of a somewhat looser connection between the original, copyrighted work and subsequent creative works. In any event, Congress has removed the whole subject of photocopying by libraries out of the doctrine of fair use (§ 107) and into a separate statutory exemption (§ 108). For that reason and in view of the uniqueness of its facts, *see* 487 F.2d at 1362, *Williams & Wilkins* has not exerted, and should not exert, any general influence on the law of fair use. In the instant case there are no subsequent creative works that justify application of the fair use doctrine.

[9] The four factors listed in § 107 should be considered only in determining whether a use suitable for fair use—*i.e.*, an independent creative use—is, under all the circumstances, fair.

[10] *See* H.R. Rep. 66; S. Rep. 62.

The home videocopyist makes no independent or creative effort; he contributes nothing to advance science or culture. He merely chisels—by making a copy for nothing. That is not fair use.

Section 107 directs that four factors be considered in determining whether a use is fair:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Purpose and character of use. What is at issue here is an *intrinsic* use—*i.e.*, a use for the same purpose as is served by the original work, so that the copy substitutes for the original. Intrinsic use cannot be a fair use.[11] No type of use can be more destructive of the incentives for creating copyrightable works than intrinsic use, which ousts the original, without paying for the labor that created it. That the intrinsic use is private and noncommercial is not a defense. "The question is not whether a copy is marketable, but whether it is piratical." *Fishel* v. *Lueckel*, 53 F. 499, 500 (C.C.S.D.N.Y. 1892). Even a non-profit educational purpose does not make intrinsic use fair. *Wihtol* v. *Crow*, 309 F.2d 777 (8th Cir. 1962).

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[11] *See, e.g., Folsom* v. *Marsh*, *supra*, at 344-45. In *Meredith Corp.* v. *Harper & Row, Publishers*, 378 F. Supp. 686, 690 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974), the court held: "As to the purpose of the 'use', there is no question on this record that it was to enable Meredith to compete with the very text from which the selections were taken . . . . That this is impermissible hardly needs statement."

Nature of the copyrighted work. The Register of Copyrights has observed that this factor "establishes a somewhat higher degree of insulation from the fair use exemption for highly creative works, as distinguished from informational works. On this score, motion pictures number among the most complex and creative works protected by copyright." [12]

Amount and substantiality of the taking. The copying at issue here is copying of entire copyrighted works. Such copying cannot be fair use.[13] The copying of an entire work is unlikely to be a creative use; it is likely to be an intrinsic use (as in the instant case). Even for educational purposes, the copying of the entirety of a substantial work, such as a motion picture, is not fair use. *See Encyclopaedia Britannica Educ. Corp.* v. *Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978); *Wihtol* v. *Crow*, 309 F.2d 777 (8th Cir. 1962) (copying of copyrighted song for use by school and church choirs is not fair use); S. Rep. 64.

Effect on Potential Market. This factor should not be confused with provable damages to the copyright holder from any particular copyist's infringement:

> This factor rather poses the issue of whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged

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[12] Statement of David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services, Before the S. Comm. on the Judiciary, 97th Cong., 2d Sess. 23 (April 21, 1982) (hereinafter cited as "Ladd Testimony").

[13] *E.g.*, *Leon* v. *Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937); *Public Affairs Associates* v. *Rickover*, 284 F.2d 262, 272 (D.C. Cir. 1960) (Reed, J.), *vacated for insufficient record*, 369 U.S. 111 (1962); *Wihtol* v. *Crow*, 309 F.2d 777, 780 (8th Cir. 1962); *Rosemont Enterprises* v. *Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Walt Disney Productions* v. *Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979). The one case possibly to the contrary was the anomalous *Williams & Wilkins*. See n.8, *supra*.

> in by the defendant or by others) would result in a substantially adverse impact on the potential market for or value of the plaintiff's work.

3 Nimmer on Copyright § 13.05[A] at 13-62 (1981). With exceptions not applicable here, "a use that supplants any part of the normal market for a copyrighted work" is an infringement. S. Rep. 65.

Amicus has filed this brief because it believes that, due to VTRs, the works of its members have become "so easy of replication" that incentive to produce would be depressed "by the prospect of rampant reproduction by free-loaders." *Cf.* Kaplan 74. The person who makes a videocopy (whether for time-shifting or for librarying) has a demand for a copy for subsequent viewing. In the case of many copyrighted works, that demand could be satisfied by renting or buying a pre-recorded cassette. Time-shifting is competitive with renting; librarying, with buying.[14] From such rentals or sales, film-makers would derive copyright revenues,[15] which would be a stimulus to further productive labors.[16]

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[14] The demand of the person unable to watch his television set when a work was being broadcast might also be satisfied by subsequent network re-broadcast, by syndicated broadcast by local stations, by a subsequent cable or pay-per-view broadcast, or by theatrical re-issue.

[15] These revenues would exceed the increment they would receive from the payments by television advertisers for reaching the viewers who see video copies. The amounts the advertisers would be willing to pay would be discounted because (i) people who view videocopies may not have the demographic characteristics the advertisers are willing to pay for; (ii) subsequent viewing may be less beneficial to the advertisers' marketing strategy; (iii) the videocopiers make possible the deletion of commercials.

[16] In recent congressional testimony, the Register of Copyrights presented a review of studies of the impact of home videorecording on the ancillary markets for motion pictures. Ladd Testimony 26-33. His conclusion was: "Both the television and the motion picture production industries are in turbulent waters already. Necessarily,

In sum, under all the factors listed in § 107, the videocopying of motion pictures is not a fair use.

The fair use doctrine addresses the issue that "is the most troublesome in the whole law of copyright . . . ." *Dellar* v. *Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (L. Hand, A. Hand, & Patterson, JJ.) The doctrine consists of a coherent rationale and a consistent set of subsidiary rules carrying it out. It reflects studious attention to the ways in which the claims of primary and secondary authors are to be reconciled so that the progress of knowledge and culture may be encouraged. The doctrine has served its constitutional purpose of promoting the flowering of our national creative genius. It should not be subjected to the extreme distortions that would be required for it to embrace the non-creative videocopying at issue here.[17]

Petitioners argue, however, that the doctrine of fair use should be stretched to reach home videocopying in order to advance First Amendment interests in broad public consumption of ideas. It has generally been thought, however, that the law of copyright creates no issue under the First Amendment because it does not restrain the circulation of ideas (as distinct from particular forms of expression),[18] and because, in any event,

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they have been increasingly relying on subsidiary markets to survive, and that trend will continue. Home taping threatens a new, but nevertheless major, and growingly important, subsidiary market." *Id.* 33.

[17] Such distortion of the fair use doctrine would violate Congressional intent. In the 1976 Copyright Act Congress created numerous exemptions to deal with specific problems outside the scope of traditional fair use. *See* 17 U.S.C. §§ 108-118 (Supp. IV 1980). Congress did not create a similar exemption for home videocopying. Therefore, this Court should not create such an exemption of its own authority.

[18] *See, e.g., Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977).

the doctrine of fair use properly reconciles the interests in protection of works with the interests in subsequent use.[19] *Amicus* submits that, in this case, the Court need not decide whether a particular rule of copyright law could conceivably offend the First Amendment. This case not only does not involve the suppression of ideas; it does not involve *any* suppression of expression by anyone.

Where the First Amendment recognizes a right to receive communications, it "presupposes a willing speaker." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976). *Stanley* v. *Georgia*, 394 U.S. 557 (1969), was such a case: the publisher of the materials involved certainly desired that people be permitted to read them in their homes; the objection was made not by the "speaker" but by the State of Georgia. Here, the objection is by the "speakers"—respondents, various *amici*, and other copyright holders. The First Amendment interest is in dissemination in accordance with the speaker's wishes and free from unjustified interference by government; there is no First Amendment interest in dissemination contrary to a speaker's wishes.

If home videocopying is viewed as speech, the First Amendment interest in it is non-existent or *de minimis*. In duplicating and privately re-playing previously televised works, the owner of the VTR brings nothing to the community's marketplace of ideas. Nor does he serve the First Amendment interest in self-expression, for he is merely copying the expressions of others. Indeed, he is not even practicing personal skill as a copyist —he merely turns on Sony's machine, and the machine does the copying for him. Whatever may be said for such passive, non-creative copying, any tenuous First Amendment interest in its protection is sufficiently outweighed by the purposes of protecting copyrights.

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[19] *See, e.g., Triangle Publications, Inc.* v. *Knight-Ridder Newspapers*, 626 F.2d 1171 (5th Cir. 1980).

Petitioners also rely on the Communications Act of 1934, 47 U.S.C. §§ 301 *et seq.* (1976, Supp. IV 1980, and West Supp. 1982), and the national policy "encourag-[ing] the larger and more effective use of radio [and television] in the public interest." Pet. Brief 24-27. The national policy is satisfied, however, when works are broadcast. Effective use of broadcast technology does not require the use of a quite distinct technology for making and replaying copies of broadcast programs. Unlike CATV in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp.* v. *CBS*, 415 U.S. 394 (1974), video recorders do not merely "enhance the viewer's capacity to receive the broadcaster's signals . . . ." 392 U.S. at 399. Rather, they enable the viewer (i) to view the program at a different time, (ii) to view it repeatedly at unlimited times after the broadcast, (iii) to make one or more separate and distinct copies of it, and (iv) to alter those copies by deleting commercials and in other ways. The VTR owner does not use his VTR merely to receive the broadcast signal. Having *already* received it by means of his television set, he *replays* it, perhaps over and over again. That is a matter outside the scope or purpose of the Communications Act and within the scope and purpose of the Copyright Act.[20] Moreover, a reduction in copyright protection in this context might well lead to a corresponding reduction (or delay) in the availability of copyrighted works for licensure to television. The result would be that the copying by some viewers would result in a loss of programming desired by others.

The District Court in this case gave rein to a perhaps natural inclination to approve large scale recording

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[20] It has been national policy since 1789 that the dissemination of copyrighted works should be left to the control of the copyright holder (and not to other private parties or to the government). *See* L. Seltzer, Exemptions and Fair Use in Copyright 11-12 (1978).

of copyrighted works in private homes. It disregarded the considerations raised in the recent testimony of the Register of Copyrights: [21]

> Authors and copyright owners are, because of their creative and entrepreneurial talents, a unique group. They are a minority that cannot readily mobilize vast popular support on legislative issues, particularly copyright ones, which affect their interests directly and, ultimately, ours as well. That is true especially when the public is offered the choice of using copyright property for free—or ostensibly for free. But because their contributions to the nation's welfare, culture, and economy are great, the protection of their interests lies on our conscience not only as a matter of sound policy but of equity.

II. PETITIONERS ARE LIABLE AS DIRECT OR CONTRIBUTORY INFRINGERS.

A. Petitioners are Liable as Direct and Contributory Infringers.

Copyright infringement is in the nature of a tort. *Screen Gems-Columbia Music, Inc.* v. *Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966) (Weinfeld, J.). Familiar principles of joint tort liability apply. *Id.*[22] Where there is a concert of action—a common scheme or plan, the provision by one party to another of assistance or encouragement, or mutual intent to cooperate—all those participating in the infringement are jointly and severally liable.[23] Express agreement is not necessary. Prosser § 46 at 392.

An additional basis for ancillary liability for copyright infringement is contributory infringement. In

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[21] Ladd Testimony 5.

[22] *See also, e.g., Screen Gems-Columbia Music, Inc.* v. *Metlis & Lebow Corp.*, 453 F.2d 552, 554 (2d Cir. 1972).

[23] *See generally*, W. Prosser, Handbook of the Law of Torts, § 46 (4th ed. 1971) (hereinafter cited as "Prosser").

theory, the distinction between joint liability for direct infringement and liability for contributory infringement is that the latter does not require concert of action, but is satisfied by material contribution to infringement [24] plus knowledge that infringement is likely to occur. The cases do not always distinguish between the two bases of liability.[25]

Liability for joint direct infringement and for contributory infringement has been recognized for many years. *See Harper* v. *Shoppell*, 28 F. 613 (C.C.S.D.N.Y. 1886); *Fishel* v. *Lueckel*, 53 F. 499 (C.C.S.D.N.Y. 1892); *Gross* v. *Van Dyk Gravure Co.*, 230 F. 412, 414 (2d Cir. 1916).

In *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911), the defendant, maker of an infringing film, had not publicly shown the film, but had distributed prints to jobbers. Justice Holmes, speaking for a unanimous Court, easily disposed of that defense:

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[24] Materiality is determined not by a merely quantitative analysis but by a functional analysis of the actions of the party alleged to be a contributory infringer. The Court of Appeals relied on such a functional analysis in this case.

[25] Similar doctrines exist in the fields of unfair competition and trademark infringement. *See, e.g., Coca-Cola Bottling Co.* v. *Snow Crest Beverages, Inc.*, 64 F. Supp. 980, 989 (D. Mass. 1946) (Wyzanski, J.), *aff'd*, 162 F.2d 280 (1st Cir.), *cert. denied*, 332 U.S. 809 (1947) (for unfair competition, "one who supplies another with the instruments by which that other commits a tort, must be shown to have knowledge that the other will or can reasonably be expected to commit a tort with the supplied instrument. . . . The test is whether wrongdoing by the purchaser 'might well have been anticipated by the defendant.'"); *Inwood Laboratories* v. *Ives Laboratories*, 50 USLW 4592, 4595 (June 1, 1982) ("if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible . . . .").

> The defendant not only expected but invoked by advertisements the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made. If the defendant did not contribute to the infringement it is impossible to do so except by taking part in the final act. It is liable on principles recognized in every part of the law.

222 U.S. at 64.

The more recent cases are variations on the theme. *See, e.g., Universal Pictures Co.* v. *Harold Lloyd Corp.*, 162 F.2d 354, 365 (9th Cir. 1947); *Gershwin Pub. Corp.* v. *Columbia Artists Management*, 443 F.2d 1159 (2d Cir. 1971); *Screen Gems-Columbia Music, Inc.* v. *Mark-Fi Records, Inc., supra; Elektra Records Co.* v. *Gem Electronic Distributors*, 360 F. Supp. 821 (E.D.N.Y. 1973).

In *Elektra*, the defendants operated stores in which a prime attraction was a coin-operated machine called "Make-A-Tape," which could duplicate pre-recorded tapes. The defendants sold blank tapes to their customers and allowed them to borrow copyrighted tapes for the purpose of duplicating them in the Make-A-Tape machines. The facts strikingly resemble those in the instant case: (i) the defendants supplied the machines and tapes necessary to do the copying; (ii) the copying was done by private individuals presumably for subsequent private, non-commercial use in their homes; (iii) the private individuals selected the works to be copied without control by the defendants (and presumably were not limited to the works available from the defendants).

In *Elektra* the copyright holders could not feasibly identify and proceed against the primary infringers, the individual users of the Make-A-Tape machines. Similarly here, the copyright holders cannot feasibly identify

and proceed against the individuals who use VTRs to record copyrighted works. In both situations, liability for joint direct infringement or contributory infringement is needed to carry out the system of incentives established by the Copyright Act pursuant to the constitutional mandate. *See Mazer* v. *Stein*, 347 U.S. 201, 219 (1954).

The *Elektra* facts differ from those in the instant case in two respects: (i) the defendants there provided a library of works available for copying, whereas petitioners provide a mechanism for receiving a "library" of television signals as the first stage of copying; (ii) the copying there took place in a store, whereas here it takes place in homes.[26] The first difference ought not to matter: petitioners have no occasion to provide the material to be copied because it is provided free by television. Petitioners' supplying of the necessary machine and tapes in circumstances where they know that the leading use is to duplicate copyrighted works available free off-the-air is a contribution sufficient for liability. Nor should the second difference change the result: no invasion of homes is necessary to establish the liability of these corporate petitioners.[27]

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[26] Not all the copying, of course, takes place in homes, for VTRs can operate as readily in offices, stores, hotel lounges, bars, and restaurants. Some of the petitioners operated VTRs in their stores.

[27] The District Court below thought *Elektra* distinguishable on the ground that the Make-A-Tape machine was suitable only for infringing uses. This point will be discussed at pp. 19-23, *infra*.

The District Court, 480 F. Supp. at 458, also relied on the fact that the court in *Elektra* refused to find that the use of the Make-A-Tape machine was within the congressionally created exemption for home copying of sound recordings. *See* 360 F. Supp. at 824-25. The two situations are not comparable, however. In *Elektra*, the court refused to extend a narrowly defined express congressional exemption to circumstances outside its scope, where the effect of the extension would be to permit what the court characterized as "mass piracy on a custom basis," 360 F. Supp. at 825. The question in this case is not whether to extend a limited congressional exemp-

Under the legal standards for joint direct infringement and contributory infringement, the facts stipulated by petitioners, found by the District Court, or suitable for judicial notice, are sufficient to establish liability:

1. Sony designs and markets to the public VTRs whose primary purpose is to record television programs off the air. Trial Tr. 1778-79 (Stipulation).
2. Sony designs and markets tapes for use in its VTRs. 480 F. Supp. at 435. As the copying of television programs (including copyrighted programs) increases, Sony's sales of tapes and its revenues from such sales will also increase. Thereby, Sony profits from infringement by its ultimate customers.
3. Sony also designs and markets equipment that does not record off-the-air television programs, but only plays back prerecorded cassettes. Pl. Ex. 552.
4. All or most of the motion pictures shown on television and the most popular programs shown on television (*i.e.*, prime time entertainment) are protected by copyright.[28]
5. Petitioners' promotional campaign for VTRs encouraged the public to "build libraries," and to record "favorite shows," "novels for television," "movies," "classic movies," and the like. 480 F. Supp. at 436, 460.

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tion, but whether to immunize, without any support in the statute or committee reports, a different practice that would also lead to "mass piracy on a custom basis." *Elektra*'s concern to prevent that kind of result supports, rather than impedes, a finding of liability in this case.

[28] An original work is protected by copyright from the moment it is fixed in a tangible medium, whether or not it is ever registered. 17 U.S.C. § 302(a) (1976); 2 Nimmer on Copyright, § 7.16[A][1], at 7-111. A live performance that is not simultaneously fixed is protected under state law. *See, e.g., Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

6. Owners of VTRs have, on average, numerous tapes containing materials recorded from television, 480 F. Supp. at 438. Obviously, people having such extensive collections of recorded tapes are not using their VTRs *merely* for time-shifting. Ladd Testimony 9, 32.

Joint Direct Infringement. Petitioners' advertisements were an inducement to infringe: movies, novels for television, and favorite shows—the kinds of works the advertisements encouraged their customers to copy—are almost all protected by copyright. That the use of VTRs would largely consist of recording popular, copyrighted works was not merely probable; it was morally certain.

The District Court refused to find inducement to infringe because the specific VTR owners involved in the suit had not been influenced by the advertisements. 480 F. Supp. at 460. That ground of decision is insufficient. Petitioners ought to be held to the natural tendency of their professionally designed advertisements to achieve their desired effects. No evidence of effect on specific primary infringers is necessary. Such evidence was not required in *Kalem.*

Contributory Infringement. The District Court's findings demonstrate guilty knowledge, or at least recklessness, with respect both to the fact that VTRs would be used to copy copyrighted works, and that such copying was unlawful:

1. "The Betamax operating instructions . . . include a warning about possible copyright infringement. On page 17 of the instruction booklet, the following language appears: 'Television programs, films, videotapes and other materials may be copyrighted. Unauthorized recording of such material may be contrary to the provisions of the United States copyright laws.'" 480 F. Supp. at 436.

2. "The Betamax warranty states that there shall be no liability on the part of the manufacturer, distributor or seller for any loss or damage arising directly or indirectly from the use of the Betamax." *Id.*

3. In November, 1975, Sonam [the distributor of the Betamax] agreed to indemnify DDBI [its advertising agency] for any liability arising from this advertising campaign." *Id.*

The District Court considered even " 'constructive knowledge' of the recording of copyrighted works," insufficient for liability as a matter of law. 480 F. Supp. at 460. It held that petitioners had to know not only that their customers would copy copyrighted works, but also that such copying would be infringement, and that such knowledge was lacking because there had been no prior judicial decision so holding. That should not be the law.

Home recording is copying prohibited by § 106, and nothing in §§ 107-118 exempts home recording from the prohibitions of § 106. These sophisticated petitioners were aware of the legal risks they created by the sale of VTRs and tapes. They were willing to run those risks, at the expense of copyright holders, in order to obtain profits from the sale of VTRs and tapes. They cannot plausibly claim innocence or ignorance of the intended consequences of their acts. They knew as much as the Make-A-Tape defendants. There is no unfairness in holding that they had sufficient notice from the statute to satisfy whatever requirement of knowledge is imposed by the doctrine of contributory copyright infringement.

B. The "Staple Article of Commerce" Doctrine Provides No Defense in This Case.

The "staple article of commerce" doctrine is part of the law of contributory *patent* infringement. The Patent Act of 1952, 35 U.S.C. § 271(c) (1976) provides:

> Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adopted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer.

In the field of copyright, cases of parasitical production (where there has been some copying, but less than wholesale appropriation) have generally been decided under the "fair use" doctrine. There is no such doctrine in the patent field: any unauthorized "use" of a patented invention is an infringement. 35 U.S.C. § 271(a). In the patent field, one class of cases of parasitical production has involved the manufacture of components for a patented invention or the manufacture of other articles that are used with it. The question has been whether such manufacture violates the patent.

As recounted in *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 187-97 (1980), the doctrine of contributory patent infringement has a long and checkered history. In early decisions, the Court expanded the doctrine to the point where it threatened to extend patent monopolies to unjustifiable dimensions; in later decisions, the Court nearly eliminated the doctrine altogether.

Congress then enacted 35 U.S.C. § 271(c) and (d). The compromise expressed in § 271(c) was that contributory patent infringement could be based on the selling of components (and, in the case of process patents, materials and apparatuses for use in practicing the process) where the articles sold are non-staples, but not where they are staples. The rationale is an obvious one: to prevent the undue expansion of the patent monopoly to general articles of commerce, while preserving to the patentee the monopoly over components whose predominant use is in connection with the patented invention.

The "staple article" doctrine is a limitation on contributory infringement under § 271(c). The doctrine does not apply to § 271(b), which provides in its entirety:

> "Whoever actively induces infringement of a patent shall be liable as an infringer."

Fromberg, Inc. v. *Thornhill*, 315 F.2d 407, 411 (5th Cir. 1963) provides an oft-cited summary of the range of activities constituting contributory infringement and codified as "active inducement" in the Patent Act:

> Of course inducement has connotations of active steps knowingly taken—knowingly in the sense of purposeful, intentional, as distinguished from accidental or inadvertent. But with that qualifying approach, *the term is as broad as the range of actions by which one in fact causes, or urges, or encourages, or aids another to infringe a patent.* 315 F.2d at 411. (Emphasis supplied.)

Thus, as the District Court failed to recognize, 480 F. Supp. at 461, even in the patent field the "staple article" doctrine is no defense for a seller of a staple article who has induced an infringement. The social interest in competition justifies independent selling of staple articles for use in patented inventions, but there is no justification for inducement to infringe. Therefore, even if the "staple article of commerce" doctrine were to be transplanted from patent law into copyright law, it would provide no defense to petitioners if, as argued at pp. 13-18, *supra*, they induced copyright infringement.

The District Court failed also to consider that the "staple article" doctrine reflects features unique to patent law, and addresses problems that do not arise in copyright law. In patent law, the doctrine serves as a necessary limitation on the absolute monopoly of use of a patented invention given by law to the patentee. No such absolute monopoly of use exists in the copyright law: ideas, as distinct from expressions, are uncopy-

rightable,[29] and the fair use doctrine substantially limits even the monopoly over use of the copyrighted expression. The "staple article" doctrine addresses the peculiar problem in patent law of control over *components* of a patented invention, or articles used *with* a process patent. No similar problem arises in copyright law: uses of "components" of a copyrighted work are governed by the fair use doctrine, and there is no problem of sales of components of a copyrighted work for use with it. Nor is there in copyright law anything analogous to a process patent: though expressions of an original business procedure, for example, may be copyrighted, the procedure itself is not subject to copyright.[30]

VTRs are not staple articles of commerce. They were designed and marketed for the specific purpose of allowing users to record off-the-air. Because so much of television programming, and virtually all of "prime-time" programming, is protected by copyright, *see* n.28, *supra*, it is beyond dispute that the predominant use of the VTR is to reproduce copyrighted works; or, in the language of *Kalem*, such is its most "conspicuous" use. In view of the way petitioners have designed and promoted VTRs, it is fair to presume that their use in applications not involving the recording of copyrighted works—though theoretically possible—is, in fact, insubstantial.

C. A Finding of Liability Would Not Doom the VTR.

Petitioners express the fear that, if they are found liable as joint direct infringers or contributory infringers, "then the supply of home VTRs (and home VTR reception) will terminate." Pet. Brief 40. There is no reason to expect such a dire ultimate result.

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[29] *Mazer* v. *Stein*, 347 U.S. 1, 217 (1954); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir.) (L.Hand, J.), *cert. denied*, 298 U.S. 669 (1936).

[30] *Baker* v. *Selden*, 101 U.S. 99 (1879); *Continental Casualty Co.* v. *Beardsley*, 253 F.2d 702 (2d Cir.), *cert. denied*, 358 U.S. 816 (1958).

Licensors of copyrighted works to television have no interest in suppressing VTR technology. Their interest is in suppressing unauthorized copying (*i.e.* infringement) and putting in its place arrangements under which copyright holders will be fairly compensated for VTR copying. Both petitioners and copyright holders have an interest in the continued marketing, at affordable prices, of VTRs and tapes. In our free market economy, ordinary economic motivations and rational calculation can be relied on to lead to arrangements in which the interests of all concerned will be advanced. The arrangements for exploitation of copyrighted musical compositions (*e.g.*, ASCAP, BMI) provide an analogy. If difficulties are encountered in structuring private arrangements, then resort may be had to the courts or to the Congress. The precise nature of the relief that might be provided by a court or by the Congress has not been determined and is not before this Court for review.

III. THE MPAA HAS CONSISTENTLY MAINTAINED THAT HOME VIDEOCOPYING OF COPYRIGHTED WORKS IS AN INFRINGEMENT.

The MPAA has consistently maintained that home videorecording of copyrighted works is an infringement under both the old and new Copyright Acts. There is no basis for the argument made in the *amici curiae* Brief filed by the five advertising agencies (the "advertising agencies")[31] that the motion picture industry accepted home videocopying as a fair use. Adv. *Amici* Brief 9.

In 1962, in its comments on the 1961 Report of the Register of Copyrights, the MPAA stated plainly that the home videotaping of copyrighted works violated the copyright owner's exclusive right to reproduce the copyrighted work.

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[31] The *amici curiae* include McCann-Erickson, Inc.; Batten, Barton, Durstine & Osborn, Inc.; Backer & Spielvogel, Inc.; Waring & LaRosa, Inc.; and Ammirati & Puris, Inc.

> Obviously we must control the right to make duplications of our copyrighted motion pictures, regardless of the technological forms in which fixed, or in which duplicated. Present section 1(a) of title 17, from which this right would be derived, has no limitations on the copyright right, such as being "for profit" or "public", and there should be no future limitations. We do not think our copyrighted motion pictures, in whole or in part, should be physically copied in homes, in libraries, for private research, entertainment, or otherwise, without our permission, if new technologies were to permit the easy duplication of our works by taking the same off a television screen onto a tape or wire recorder, or by duplicating a rented film, tape, or wire.

House Comm. on the Judiciary, 88th Cong., 1st Sess., Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 345 (Comm. Print 1963) (Statement of Edward A. Sargoy, of Counsel, The Copyright Committee of Motion Picture Association of America, Inc).[32]

The advertising agencies ignore that statement. They resort to comments made by the MPAA in 1962 and 1965, which they take out of context, and which have no relevance to the issue before this Court. *See* Adv. *Amici* Brief 6-9.

The advertising agencies refer to the MPAA's position on the copyright owner's *performance* right, incorporated in § 106(4), in an attempt to obscure the MPAA's position with respect to the *reproduction* right provided for

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[32] In 1965 the Register of Copyrights also took the position that the videotaping of copyrighted material constituted a reproduction within the meaning of what is now § 106(1). *See* House Comm. on the Judiciary, 89th Cong., 1st Sess., Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. 17 (Comm. Print 1965).

in § 106(1). *See* Adv. *Amici* Brief 6-7 and App. C to their Brief. In arguing that the MPAA "acquiesced" in limiting the performance right in § 106(4) to public performances, however, the advertising agencies fail to note that § 106(1) contains no such limitation or qualification. Moreover, the MPAA's position as quoted in App. C was not one of acquiescence: the MPAA acknowledged that the problem it was concerned about had been reduced, not that it had been eliminated.[33]

In addition, the advertising agencies foster the misimpression that the MPAA did not consider home videocopying to be an infringement because the MPAA, in its statement before the House Judiciary Committee in 1965, referred to the fact that the Sony VTR would soon be available to consumers without simultaneously asserting that the use of such a machine to reproduce copyrighted

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[33] As is clear from the MPAA's comments in 1962 and 1965 regarding the copyright owner's performance right, 17 U.S.C. § 106(4) (Supp. IV 1980), the MPAA was initially opposed to the Register's proposal to qualify the performance right by requiring that the motion picture be performed "publicly." The MPAA's opposition was a result of its concern that there would be no remedy for the nonpublic exhibition of copyrighted films by unauthorized distributors or renters, not because of any concern about unauthorized home copying of films, which was, in the MPAA's view, clearly prohibited by the unqualified exclusive right to reproduce provided for in § 106(1). Moreover, the MPAA's concern regarding the public performance right was largely alleviated by the safeguards that were incorporated into the Register's proposed 1965 bill, including an express right to distribute "by rental, lease or lending" (§ 106(3)), and an expansive definition of the term "publicly", 17 U.S.C. (§ 101) (Supp. IV 1980). *See* House Comm. on the Judiciary, 88th Cong., 1st Sess., Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 345-50 (Comm. Print 1963); House Comm. on the Judiciary, 89th Cong., 1st Sess., Copyright Law Revision, Part 5, 1964 Revision Bill with Discussions and Comments 302-03 (Comm. Print 1965).

movies would be an infringement. Adv. *Amici* Brief 8-9.[34] Once again the advertising agencies have extracted the MPAA's comments from their context in an effort to attribute to the MPAA a position it did not take. The MPAA was already on record as clearly opposing any type of exemption or defense for home-use copying by means of a VTR. When it referred to the Sony VTR, the MPAA was addressing only the issue of the Register's proposal to exempt ephemeral recordings by authorized transmitters (§ 112) (*see* Copyright Law Revision—Part 2: Hearings before Subcomm. No. 3 of the Committee on the Judiciary of the House of Representatives, H.R. 4347, H.R. 5680, H.R. 6831 and H.R. 6835, 89th Cong., 1st Sess., Ser. No. 8, pt. 2, 1029-33 (June 16, 1965)),[35] and the MPAA did not concede in any way that home videorecording of copyrighted films would not constitute an infringement.

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[34] The petitioners also make this same argument in their Brief at 34.

[35] The MPAA's point was that the problem of film bootlegging that would occur with the advent of videotape recorders was not a reason to dismiss out of hand the problem of bootlegging caused by permitting the retention of ephemeral recordings. Pet. Brief at 34.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

RICHARD M. COOPER
(Counsel of Record)
ELLEN S. HUVELLE
NANCY F. PREISS
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-3017
Attorneys for Motion Picture Association of America, Inc., Amicus Curiae

BARBARA SCOTT
WILLIAM NIX
Motion Picture Association of America, Inc.
525 Fifth Avenue
New York, N.Y. 10036
Of Counsel

Date: October 27, 1982

Amicus Brief

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

SONY CORPORATION OF AMERICA, *et al.*,
Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,
Respondents.

BRIEF AMICUS CURIAE OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. IN SUPPORT OF RESPONDENTS

JON A. BAUMGARTEN
(*Counsel of Record*)

SUSAN BANES HARRIS
CRAIG R. MICHEL

PASKUS, GORDON & HYMAN
2005 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 638-1930

Attorneys for Amicus Curiae

October 27, 1982

PANDICK PRESS, WASHINGTON—1901 N. OAK STREET, ARLINGTON, VA 22209—(703) 522-4900

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IN THE

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SONY CORPORATION OF AMERICA, *et al.*,
Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,
Respondents.

BRIEF AMICUS CURIAE OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICUS CURIAE

National Music Publishers' Association, Inc. ("NMPA") is a trade association of approximately three hundred music publishers. Since 1917, NMPA, or its predecessor organization, has been the industry spokesman for the common interests of music publishers in a variety of regulatory, legislative, legal, and other activities.

NMPA has a particular interest in this case, deriving from its lengthy and prominent representation of music publishers in matters pertaining to the copyright laws. NMPA was a principal participant in the administrative and legislative consultations, meetings and hearings that culminated in the 1976 Copyright Act. It was directly involved in, and music publishers remain substantially affected by, the delicate process of accommodation of interests that is central to the 1976 Act—a

balance threatened by the revolutionary interpretation of fair use urged by petitioners and its supporters herein.

This case is of vital concern to the music publishing industry NMPA represents because it involves fundamental principles of copyright law that will be felt beyond the particular issue of home video recording; because music publishers are the owners of copyright in musical works included in motion pictures and television programs taped off-the-air and do not consent to such recording;* and because music publishers have unquestionably suffered substantial damage from other forms of private or home recording of their musical works that have had a grave impact upon their market.

NMPA submits this brief (with the consent of the parties) in support of respondents' position that home recording is not a privileged "fair use" of copyrighted works, and is not otherwise exempt from copyright infringement. Our emphasis will be on the issue of legislative history.

SUMMARY OF ARGUMENT

There is no exemption from infringement for home recording of copyrighted works under the 1976 Copyright Act. There is no statutory or implied exemption, and home recording is not fair use.

Legislative history does not show that home recording is fair use or is otherwise exempt from infringement. The history of the 1976 Act does show that home recording is not so privileged.

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* Music publishers regularly grant motion picture and television producers limited "synchronization" rights permitting the use of existing music in films and programs for theatrical and television exhibition. These rights do not include home recording. Petitioners' bald suggestion (petitioners' brief at 4-10) that "only" respondents object to off-air video recording is not only deficient as a matter of proof, but also simply ignores the valuable interests of music publishers as owners of works included in motion pictures and television programs. Music publishers most certainly do object to the unauthorized off-air video recording of *their* works.

The 1971 Sound Recording Amendment did not exempt the home recording of motion pictures or musical works, and did not even clearly exempt the home duplication of sound recordings. In any event, that amendment is not pertinent and fragments of its history relied on by petitioners are not part of the 1976 Act.

Fair use is essentially supplementary in nature. It does not permit the home recording of entire copyrighted works for the purpose of entertainment.

ARGUMENT

I. LEGISLATIVE HISTORY DOES NOT SHOW THAT HOME RECORDING IS FAIR USE OR OTHERWISE EXEMPT FROM INFRINGEMENT

Petitioners claim that the legislative history of the 1976 Copyright Act and 1971 Sound Recording/Anti-Piracy Law shows that Congress intended home recording to be a fair use. However, consideration of the record demonstrates no Congressional intent to exempt home recording from infringement, whether under the fair use doctrine or otherwise.

A. The 1976 Copyright Act

Section 106(1) of the 1976 Act gives copyright owners the exclusive right to "reproduce" their works in copies or phonorecords. Home recording is clearly such a reproduction of copyrighted works. See 17 U.S.C. § 101. The Act then sets forth a number of detailed exceptions and limitations on the rights of copyright owners. 17 U.S.C. §§ 108-118. These exceptions and limitations clearly do not permit home recording.[1] There is thus no basis for recourse to legislative history.

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[1] Petitioners do not now claim any exemption other than under fair use. As noted, home recording is not permitted by any of the detailed limitations expressed in the Copyright Act. As will be shown, there is no basis for an additional "implied" exemption; and the construction of such an implication would not only be unsupported, it would also be manifestly inconsistent with Congress' deliberate design of first setting out the copyright owner's rights, and then subjecting them to carefully developed, detailed, and balanced

(footnote continues)

In any event, the legislative reports accompanying the 1976 Act are devoid of any suggestion that Congress considered home recording to be privileged as a fair use, or otherwise exempt.[2] But the reports are quite pertinent to the issue. They show an awareness of relevant recording technology, concern with its impact upon copyright owners, and a desire to limit permissible unauthorized reproduction of copyrighted works by recording devices to narrow circumstances. The reports, at the least, refute petitioners' reliance on legislative history as specific authority for fair use treatment of home recording. But more than that, they show that Congress *did not* exempt home recording or consider the fair use doctrine to be of the breadth and effect argued by petitioners.

The House Report, for example, expressly acknowledged that "infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by . . . recapturing off the air . . . . " H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 106 (1976) ("1976 House Report"). The Senate Report emphasized that "[t]he committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances be considered 'fair use.' " S. Rep. No. 94-473, 94th Cong., 1st Sess. 66 (1975) ("1975 Senate Report"). It is futile to attempt reconciliation of these statements with a presumed Congressional intent to exculpate home recording of any works—whether motion pictures, musical compositions, or sound recordings.

But Congress did not close its eyes to the popular availability of recording technology. Instead, it sought to balance

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(footnote continued)

explicit limitations. See, *e.g.*, S. Rep. No. 94-473, 94th Cong., 1st Sess. 57, 59 (1975); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 61, 62 (1976). Home recording cannot be freed from infringement by "limitations and conditions which the legislature has not expressed." *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980), *quoting United States v. Dubilier Condenser Corp. 289 U.S. 178, 199 (1933)*.

[2] The same is true of the hearing record on the omnibus revision bills that culminated in the 1976 Act.

the apparent use of recording devices with the rights of copyright owners, and to restrict permissible unauthorized recording to narrowly defined circumstances, hallmarked by particular factors. Thus, for example, Congress endorsed certain "guidelines" for educational uses of musical works under the fair use doctrine. These guidelines restrict fair use treatment of unauthorized recordings of music to those made from performances by students "for evaluation or rehearsal purposes" or from phonorecords owned by an educational institution or teacher "for the purpose of constructing aural exercises or examinations." 1976 House Report 71; H.R. [Conference] Rep. No. 94-1733, 94th Cong., 2d Sess. 70 (1976) ("Conference Report"). Congress also specifically exempted off-air recording of noncommercial educational broadcasts of music by nonprofit institutions for educational use, but only under stringently limiting conditions (17 U.S.C. § 118(d)(3));[3] and it indicated that the fair use doctrine could apply to off-air taping by educational institutions only in

[3] This exclusion hardly suggests Congressional acquiescence in *any* "nonprofit" or "non-commercial" use. In fact, the reports accompanying the 1976 Act show that Congress carefully and deliberately avoided imposing a general "not-for-profit" or "non-commercial" exemption on the rights of copyright owners. *E.g.*, 1975 Senate Report 59; 1976 House Report 66. (In view of the potential impact of home recording copies on an individual's inclination to purchase market copies, it may be doubted that home recording even deserves the sobriquet of "nonprofit" or "non-commercial.")

In section 108(f)(3) of the 1976 Act, Congress also expressly permitted off-air recording of certain *news* programs by *particular qualifying libraries* "for *limited* distribution to scholars and researchers for use in research purposes." 1976 House Report 77 (emphasis added). This exception was intentionally "narrowly drafted." 1975 Senate Report 69. That Congress did not intend to give *carte blanche* to recording for even scholarly purposes is also shown by the fact that the House Judiciary Committee, when specifically considering the audio duplication of recordings for purposes of scholarly research by musicologists, did not even suggest that the Act exempted such use. Instead, it noted that the issue was being handled by *licenses* from copyright owners and that, should it become necessary to go beyond this, additional *legislation* could be undertaken. 1976 House Report 107.

"limited" circumstances.[4] It is equally fruitless to attempt reconciliation of this carefully limited treatment of recording for the favored purpose of education with an asserted intent to permit widespread home recording for personal enjoyment and "convenience."

Petitioners try to obfuscate this issue by denying any distinction between education and entertainment (petitioners' brief at 29). The simple fact is that there is—for purposes of the Copyright Act—a difference. It is clear that a distinction between "educational" and "entertainment" (or "convenience") uses is fundamental to both the careful Congressional balancing that characterizes the 1976 Copyright Act as a whole, and proper judicial application of the fair use doctrine in particular. *Cf., e.g., Esquire, Inc. v. Ringer,* 591 F. 2d 796, 805 (D.C. Cir. 1978) (courts should generally not discriminate between genres of art, but this principle should not be extended to "undermine . . . plainly legitimate goals of copyright law"), *cert. denied,* 440 U.S. 908 (1979).

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[4] 1975 Senate Report 65-66 ("The committee believes that the making by a school located in . . . a remote area of an off-the-air recording of an instructional television transmission for the purpose of a delayed viewing of the program by students for [*sic.*] the same school constitutes a 'fair use.' The committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances be considered 'fair use.' "); 1976 House Report 71 ("The Committee believes that the fair use doctrine has some limited application to off-air taping for non-profit classroom use.") The House Judiciary Committee requested the parties to develop guidelines for fair use in such circumstances. These guidelines were adopted and endorsed by Chairman Kastenmeier of the House Copyright Subcommittee. See *Congressional Record,* October 14, 1981 at E 4751. They include strict conditions and limitations on even this educational use; and Mr. Kastenmeier observed that "beyond these guidelines specific permissions from copyright owners may be required under the Copyright Law." *Id.* See also, H.R. Rep. No. 97-495, 97th Cong., 2d Sess. 6-12 (1982).

Congress also felt that fair use could apply to off-air recording by non-profit educational institutions for the deaf and hearing-impaired, but only "as long as clear-cut restraints are imposed and enforced." *Congressional Record,* Sept. 22, 1976 at H 10875, approved in Conference Report at 70.

Petitioners rely (petitioners' brief at 33) on an isolated statement from the 1961 Register's Report[5] to support their argument that the "legislative history" of the 1976 Act permits home recording as fair use. This reliance is misplaced. The Register's statement was made in the context of discussing *performance* rights in motion pictures. It was not addressed to reproduction rights,[6] and referred only in passing to possible "future" home recording. 1961 Register's Report at 29-30. Although, in that context and at that time, the Register indicated that he did "not believe the private use [*i.e., performance*] of such a reproduction can or should be precluded by copyright," he did not recommend any statutory exemption for private reproduction, or any limitation on the reproduction right to public situations or dissemination. See 1961 Register's Report at 30, 149-160.[7]

Additionally, the discussion of fair use in the same report is completely at odds with petitioners' assertion that home recording is privileged under that doctrine. Thus, the Report explained that fair use "means that a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner's market for his work" [1961 Register's Report at 24], and gave a list of examples of fair uses that did

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[5] Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 30 (July 1961) (House Committee Print, 87th Cong., 1st Sess.) ("1961 Register's Report").

[6] Under both the 1909 and 1976 Copyright Acts, performance rights were limited to "public" activity. *See generally*, 2 M.B. Nimmer, *Nimmer on Copyrights* §8.14[C](1982). No such limitation has applied to the reproduction right under either law, and (subject only to fair use or express statutory limitations) "copyright infringement occurs whenever an unauthorized copy or phonorecord is made, even if it is used solely for the private purposes of the reproducer . . . ." 2 M.B. Nimmer, *Nimmer on Copyrights*, § 8.02[C] at 8-25—26 (1982).

[7] In the passage of the 1961 Register's Report appearing between the two quotations relied on at pages 33-34 of petitioners' brief, the Register also declined to extend copyright to private *performances* of motion pictures in "schools, libraries, and the like." Petitioners' argument would lead to the conclusion that the Register therefore condoned a general practice of unauthorized *reproduction* of motion pictures by such entities, a clearly erroneous result. See 1961 Register's Report at 25.

not include anything even remotely analogous to home recording [see *id.*, and Point II, *infra*].

Moreover, petitioners ignore the nature of the 1961 Report. Its purpose was only to give "tentative" and "preliminary" views *of the Register.* 1961 Register's Report at IV, IX. It did not reflect the intent of revision bills prepared by the Copyright Office and first introduced in the Congress, after extensive discussion, revision, and refinement, three years later,[8] much less the intent of *Congress,* either generally[9] or in passing a law a decade and a half later. The Register's offhand comment about the possible "future" of home recording did not reflect anyone's "considered" review [*Zuber v. Allen,* 396 U.S. 168, 186 (1969)], or the "investigation, examination, and study" of Congress [*Diamond v. Chakrabarty,* 447 U.S. 303, 317(1980)], or the contemporaneous nature, that are necessary to elevate it to the conclusive stature urged by petitioners.

A proper view of the role of the 1961 Register's Report as "an experimental device for provoking discussion and suggestions" (1965 Register's Supplementary Report at XI) is particularly important because: (a) in discussions immediately following its issuance, copyright owners did assert that their works should not "be physically copied in homes . . . without our permission, if new technologies were to permit [their] duplication . . . by taking the same off a television screen onto a tape or wire recorder, or by duplicating a rented film, tape, or wire;"[10] and (b) the Register's next report, which included many variations from his 1961 views that were prompted by

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[8] See Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law IX-XI (May 1965) (House Committee Print, 89th Cong., 1st Sess.) ("1965 Register's Supplementary Report"). Many views of the Register changed between 1961 and 1965, and many were not reflected in the 1976 Act as finally passed by Congress.

[9] See *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co.,* 387 U.S. 397, 418 (1967).

[10] Copyright Law Revision, Part 2: Discussion and Comments on Report of the Register of Copyrights 341, 345 (February 1963) (House Committee Print, 88th Cong., 1st Sess.)

such discussions, did not offer any suggestion of privileged treatment for home recording. In fact, the 1965 Supplementary Report indicated an increased *concern* over the impact of home recording on copyright owners. It observed:

> " . . . the imminent development of home video tape recordings seems likely to make ephemeral recordings by authorized transmitters a minor source of danger."[11]

This statement obviously recognizes the comparatively "major" danger then seen to be posed by home recording. It defies logic to assume that the Register, *sub silento*, recommended subjecting copyright owners to that spectre.[12]

In sum, the history of the revision bills that resulted in the 1976 Copyright Act does not indicate any Congressional (or administrative) recognition of home recording as fair use or exempted activity, but does reflect quite the contrary.

B. The 1971 Sound Recording/Anti-Piracy Law

Petitioners' argument that home recording was "intended" to be treated as fair use under the 1976 Copyright Act rests most heavily on a few fragments taken from the record of the House of Representatives' consideration of a different statute: the 1971 Sound Recording/Anti-Piracy Amendment to the 1909 Copyright Act, P.L. 92-140, 85 Stat. 391. But these isolated references in the proceedings of a single chamber with

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[11] 1965 Register's Supplementary Report 47. "Ephemeral recordings by authorized transmitters" refers to recordings made for broadcast purposes by stations licensed to transmit a copyrighted work. The Register had proposed an ephemeral recording exemption for broadcasters, and the motion picture companies objected, leading to the quoted response of the Register.

[12] The Register was well aware, in his 1965 Supplementary Report, of the potential impact of "advancing technology" on copyright owners, and he acknowledged that a "real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforseen technical advances." 1965 Register's Supplementary Report 13-14.

respect to a prior law are not determinative of a fair use or other exemption for home recording under the current Act.[13]

Consideration must initially be given to the nature of the 1971 Amendment. It was enacted as a temporary measure only, and was hurriedly passed in response to the immense growth of record piracy in order to provide a deterrent to a specific activity—commercial record piracy—while leaving time for full consideration of *all* pertinent issues during the course of omnibus copyright revision. *See, e.g.*, H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 2-3 (1971). The amendment was originally scheduled to terminate, and to be inapplicable to recordings made after January 1, 1975. It was extended at the very last minute, in December 1974, only when it appeared that omnibus revision would not be completed before the terminal date and that to allow expiration would leave record piracy rampant and our treaty obligations unfulfilled. Act of December 31, 1974, P.L. 93-573, 88 Stat. 1853. See H.R. Rep. No. 93-1581, 93d Cong., 2d Sess. 2-3 (1974). The Amendment did not purport to regulate all questions of sound recording protection, and its accompanying record can hardly be viewed as a considered treatment of anything but commercial piracy. See *Libby Rod & Gun Club v. Poteat*, 594 F. 2d 742 (9th Cir. 1979).

Additionally, the "intent" of the 1971 Amendment could not have accorded special treatment to the home recording of musical works[14] or motion pictures. *Accord*, M.B. Nimmer,

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[13] As will be shown below, these references did not establish a general home recording exemption (a) even under the 1971 Amendment for the limited class of works (sound recordings) affected by the Amendment, or for other works (such as musical compositions and motion pictures) not affected by the pertinent provisions of that Amendment; or (b) under the 1976 Copyright Act. Nor could they show the "intent" of the 1909 Copyright Act. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (intent of *enacting* Congress is controlling).

[14] The protection accorded to "sound recordings" must not be confused with that available to "musical works," although both may be embodied in the same disc or tape. Phonograph records and pre-recorded tapes commonly embody two entirely distinct copyrighted works, each having its own particular history in the development of copyright legislation: (a) the recorded

(footnote continues)

Nimmer on Copyrights § 13.05[F] at 13-96 n.159 (1982). The Amendment was directed toward an entirely new form of limited[15] protection to be accorded sound recordings; it did not in any way purport to limit the protection already long established under the then-controlling 1909 Copyright Act, without any hint whatsoever of a "private," "home" or "non-commercial" reproduction exemption, for other works, such as musical compositions or motion pictures. The 1971 Congress could not determine the "intent" of the 1909 Congress or the meaning of its enactments. See fn. 13, *supra*, and text at fn. 18, *infra*. And, of course, it could not define the "intent" of the 1976 Congress.

Moreover, the few references to home recording in the history of the 1971 Sound Recording Amendment appear only in the course of House proceedings, after Senate passage of the bill embodying that Amendment, and in connection with the Senate bill. No similar considerations appear in the pertinent Senate proceedings. These isolated observations in the course of House consideration cannot be assumed to reflect any "intent" of the originating chamber or of Congress generally with respect to musical works or motion pictures (or even sound recordings). See fn.18, *infra*.

In these contexts, the references relied upon by petitioners cannot be given significance. All of them, for example, were made in the course of comparing the activities of private duplicators with commercial "pirates" toward whom the bill

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(footnote continued)

"musical work" representing the efforts of individual composers and lyricists and their publishers; and (b) the "sound recording," representing the efforts of performing artists and record companies (see 17 U.S.C. §101). Until the 1971 Amendment, the copyright law did not provide a copyright in sound recordings, while musical compositions have been protected by copyright since 1831 without any "private use" or like restrictions on reproduction rights.

[15] The protection accorded to sound recordings under the 1971 Amendment was acknowledged to be "limited" and more restricted than that available to other copyrighted works. *See, e.g.*, H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 1-2 (1971); S. Rep. No. 92-72, 92d Cong., 1st Sess. 1-2 (1971); *see generally*, 1 M.B. Nimmer, *Nimmer on Copyrights* § 109.21 (1976 ed.).

was specifically directed, and of acknowledging only the difficulties of *enforcement* against the former; not in the context of full consideration of the degree, nature, impact, or treatment of home recording itself, nor of the scope of rights in works other than sound recordings. For example, in the full colloquy between the then-Assistant Register of Copyrights and Congressman Beister, quoted only in part in petitioners' brief,[16] the Assistant Register acknowledged only that the *sound recording bill* did not "point to" home recording and that "this legislation is not addressed to" the issue of home recording. Significantly, she noted that home recording *then*—unlike now—was not in a state of "crunch," but that it was coming. These carefully qualified remarks clearly did not confer an immutable, or any, fair use status or other privilege upon home recording. See 1976 House Report 66 and 1975 Senate Report 62 (fair use not "frozen" in time, "especially during a period of rapid technological change"). And the full exchange shows further that the Assistant Register was not even speaking in terms of fair use or exemption, but rather of detection and enforcement.[17]

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[16] Petitioners' brief at 35 n. 39. The portion of the colloquy represented by an ellipses in petitioners' brief is:

> "My own opinion, whether this is philosophical dogma or not, is that sooner or later there is going to be a crunch here. But that is not what this legislation is addressed to, and I do not see the crunch coming in the immediate future.
>
> Other countries have felt it more directly than we, partly because record prices are lower here than, say, in Germany. In that situation there is a range of legal devices for trying to keep the practice under reasonable control."

Hearings on S.646 Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 1st Sess. 22 (1971).

[17] Several of petitioners' supporting *amici*, following the error of the District Court, rely on a subsequent portion of this colloquy, in which the Assistant Register used the phrase, "It is certainly not protectable under the Federal Statute." Brief of *Amicus Curiae* Pfizer, Inc. in Support of Petitioners, at 21; Brief of McCann Erickson, Inc. *et al.*, *Amici Curiae* at 14. But these parties distort the meaning of that phrase. It referred only to the fact that at that time sound recordings (unlike motion pictures, and musical works) were not protected by the Copyright Act; it did not suggest that home recording of protected works was a privileged activity. *See also*, Nimmer, "The Legal Status of Home Recording of Copyrighted Works," Appendix 7 to the Statement of the Recording Industry Association of America, Inc., *to be reprinted in Hearings on S. 1758 before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (April 21, 1982).*

The single passage of the *1971* House Report relied on at page 36 of petitioners' brief does make some reference to recorded musical works. H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 7 (1971). But no similar reference appears in the Senate's report.[18] Moreover, the amendment simply did not deal with scope of rights in musical works; hence this reference could, at most, have been the 1971 House Committee's unstudied reflection on the rights accorded to music under the 1909 Copyright Act. It could not have been probative of the meaning or "intent" of the 1909 statute.[19] *E.g., Rainwater v. U.S.*, 356 U.S. 590, 593 (1958). *See also*, fn. 13, *supra*. Additionally, the 1971 Report referred to "unrestrained" home recording, a categorization probably best attributable to a lack of enforcement (under the circumstances and considering off-air technology of the preceding decades), and not even to an assumed exemption from copyright.

But, most fundamentally, from its inception the 1971 Amendment was designed to be, and was, supplanted by the more thorough and comprehensive revision efforts that culminated in the Copyright Act of 1976. As discussed above, the legislative history of the 1976 Act does not accord privileged status to home recording. Petitioners' attempt to read portions of the legislative history of the 1971 Sound Recording Amendment into the 1976 Copyright Act lacks any support. Although portions of the House Report on the 1971 Amendment were

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[18] "The basic principle is that the content of the law must depend upon the intent of both Houses, not of just one; no one can ever know whether the Senate Committee or the Senate would have concurred in the restrictions written into the House Report." K.C. Davis, *Administrative Law Treatise* § *5:3 at 313 (1978); see also, e.g., Department of Air Force* v. *Rose*, 425 U.S. 352, 366 (1976); *Hawkes* v. *IRS*, 467 F.2d 787, 797 (6th Cir. 1972).

[19] Like considerations apply to the related colloquy relied on at 37 (fn. 42) of petitioners' brief.

repeated in the Senate and House Reports on the 1976 Act, the earlier report's single reference to home recording is pointedly omitted from the 1976 Act reports; in its stead, the 1976 reports (a) declare that "infringement" does result from "recapturing [sounds] off the air" (1976 House Report 106); (b) state that "off-the-air recording for convenience" would not be considered fair use (1975 Senate Report 66); and (c) together with sections of the Act, demonstrate Congress' concern with the use of recording devices and its imposition of limits on their non-infringing uses (see pp. 4-6, *supra*). As Professor Nimmer has noted:

> "[T]he failure to repeat in the Committee Reports for the current Act an intention to recognize the home recording exemption referred to in the House Report for the 1971 Amendment is *at least* as consistent with an altered intention upon the part of the Congress enacting the Act of 1976 [as it is with an unchanged intent]. This is particularly true in view of the fact that other passages from the House Report for the 1971 Amendment were incorporated verbatim in the House Report for the current Act."

M.B. Nimmer, *Nimmer on Copyrights* § 13.05[F] at 13-96 (1982) (emphasis added). In light of factors (a), (b), and (c) above, the conclusion of altered intent is *more* compelling.

Petitioners' authority (petitioners' brief at 37-38) for the "reading in" of the prior references is strained. It consists of, first, a letter written in *1971* referring to the merger of the amendment into the general revision, but which referred to no works other than sound recordings and—of course—could not determine the intent of Congress five years later; and, second, the Register of Copyrights' failure to discuss home recording before Congress in 1975. But the Register's silence cannot establish Congressional intent, any more than could the silence of Congress itself. *See e.g, Scripps-Howard Radio, Inc. v. FCC,*

316 U.S. 4 (1942). And, as indicated above, Congress was not silent.

C. Conclusion as to Legislative History

Amicus herein believes that a review of the administrative and legislative record conclusively shows that home recording *is not* fair use or otherwise exempt from infringement. At the very least, however, it is clear that legislative history does not cloak home recording with a particular claim to fair use or privilege. See 1976 House Report 66 ("taping" does not have "any special status" under the fair use provisions). As will be shown in Point II, it is equally clear that home recording does not fit within the contours of the fair use doctrine.

II. HOME RECORDING IS NOT FAIR USE

Although it is true that fair use cannot be precisely defined with respect to all of its potential applications, it does have a central, characteristic feature: "fair use is essentially supplementary by nature . . ." 1975 Senate Report 65. The examples of fair use given in section 107 of the Copyright Act share this feature. The same is true of other examples of fair use that may be given. *See, e.g.,* 1961 Register's Report 24; 1976 House Report 65. These examples are not exclusive, but there is no support—judicial, administrative, or legislative—for the notion that fair use should be applied to circumstances lacking this essential feature. Yet that is what petitioners seek in this case, and it must be rejected.

There is nothing "supplemental" about home recording. It consists of unauthorized reproduction of entire, copyrighted works for the purpose of individual entertainment—precisely the function for which they are created and disseminated. It is hardly surprising, therefore, that home recording fails, as found by the court below, to meet even a single criterion of the fair use doctrine.

Apart from expanding the application of fair use beyond its proper bounds, petitioners seek to give that doctrine offices

that it does not have. Fair use is not designed to grant legislative authority to courts. Thus, petitioners' arguments that it be used to accommodate alleged conflict between the copyright and communications laws must be rejected.[20] If such an accommodation is appropriate, that is a job for Congress. See *Teleprompter Corp. v. CBS*, 415 U.S. 394, 414 (1974); *Fortnightly Corp. v. United Artists Television, Inc.* 392 U.S. 390, 401 (1968). And fair use cannot serve to cloak infringing activity with legitimacy simply because it occurs in private and may therefore be difficult to control or detect. If private activity were to be so authorized it would substantially defeat the purposes and value of the copyright system to *amicus*, to respondents, and to the public. This is because unauthorized private duplication of copyrighted works is increasingly a characteristic impact of technological progress. See Remarks of David Ladd, Register of Copyrights, to the Internationale Gesellschaft fur Urheberrecht in Toronto, Canada (September 23, 1981). The Court of Appeals properly recognized that "privacy" may be pertinent to the form of relief, but that it is not relevant to the question of liability.

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[20] *Amicus* does not concede any conflict between the copyright and communications laws or any such need for accommodation here. The emphasis of petitioners and their supporting *amici* on the "public airwaves" ignores one simple fact: without the creative efforts of copyright owners the public airwaves would be simply a void in space.

CONCLUSION

For the foregoing reasons, the Ninth Circuit Court of Appeals correctly decided that home recording is not privileged by legislative history, exemption, or fair use.

Respectfully submitted,

Jon A. Baumgarten
(*Counsel of Record*)

Susan Banes Harris
Craig R. Michel

Paskus, Gordon & Hyman
2005 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 638-1930

Attorneys for Amicus Curiae
National Music Publishers'
Association, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, et al.,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC.

and

WALT DISNEY PRODUCTIONS,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL RETAIL MERCHANTS ASSOCIATION AS *AMICUS CURIAE*

PETER R. STERN
BERGER, STEINGUT, WEINER
FOX & STERN
150 East 58th Street
New York, New York 10155
(212) 980-1400
Attorneys for Amicus Curiae

Of Counsel:
THEODORE S. STEINGUT
ROBERT A. WEINER

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In The

Supreme Court of the United States

October Term, 1981

Sony Corporation of America, et al.,

Petitioners,

vs.

Universal City Studios, Inc.
and
Walt Disney Productions,

Respondents.

On Certiorari To the United States
Court of Appeals
for the Ninth Circuit

BRIEF OF NATIONAL RETAIL MERCHANTS ASSOCIATION AS AMICUS CURIAE

The National Retail Merchants Association ("NRMA") submits this brief

as amicus curiae, pursuant to Supreme Court Rule 36.2, in support of the position of Sony Corporation, Sony Corporation of America, Carter Hawley Hale Stores Inc., Associated Dry Goods Corporation, Federated Department Stores, Inc., Henry's Camera Corporation, and Doyle Dane Bernbach Inc. (sometimes referred to collectively as "Sony") that this Court should reverse the opinion of the Court of Appeals for the Ninth Circuit in Universal City Studios, Inc. v. Sony Corporation of America, 659 F.2d 963 (9th Cir. 1981).

In NRMA's view, there are a number of grounds on which the decision of the Court of Appeals should be reversed. This brief will, however, focus solely on the Court of Appeals' erroneous holding that the petitioner retailers of

Sony videotape recorders ("VTRs") -- machines which, as the District Court found below, are used for many unquestionably legitimate purposes -- were contributorily liable for the allegedly infringing activities of consumers. NRMA urges this Court to reverse the Court of Appeals and hold that it is inappropriate to find VTR sellers contributorily liable for copyright infringements under the circumstances of this case.

This brief is submitted with the written consent of all parties on file with the Clerk of this Court.

THE INTERESTS OF AMICUS CURIAE

NRMA is a non-profit, voluntary trade association whose over 3,500 corporate members operate more than 35,000 department, chain and specialty stores

throughout the nation. Many of NRMA's members sell consumer electronic equipment, including VTRs and video tapes, and are therefore vitally interested in the issues raised by this case.

In fact, NRMA's members include three of the four retailer defendants -- Carter Hawley Hale Stores, Inc., Associated Dry Goods Corporation, and Federated Department Stores, Inc. -- held contributorily liable for alleged infringements committed by consumers using VTRs for non-commercial purposes. In addition, another member of NRMA, Sears, Roebuck and Co., has been named as a defendant in a similar copyright infringement case brought by Universal City Studios, Inc. after the Ninth Circuit rendered its opinion in this case. Universal City Studios, Inc. v. RCA Corp. et al., No. 81-5723 FW (filed November 6, 1981, C.D. Cal.).

NRMA submits that the Court of Appeals erred in broadening the scope of the doctrine of contributory infringement, particularly with respect to the liability of sellers of goods which, because they are capable of many noninfringing uses, should be deemed staple articles of commerce. Accordingly, the mere sale of such staple articles of commerce as VTRS cannot, as a matter of law, constitute copyright infringement. Furthermore, the Court of Appeals failed to consider the nature of a retailer's activities with respect to goods such as VTRs. Retailers are merely the last step in the chain of distribution, the conduit for conveying the VTRs from the manufacturer or distributor to the consumers, and have no control over the design or features of the machines. Retailers should not be held contributorily liable in cases such

as this one, in which the alleged infringement relates to the way in which VTRs are used by consumers in the privacy of their homes. NRMA therefore urges on behalf of its members that this Court reverse the decision of the Court of Appeals.

SUMMARY OF ARGUMENT

In extending the doctrine of contributory infringement to retail sellers of VTRs, the Court of Appeals committed reversible error because:

(1) it misapplied the applicable legal standards, including the analogous patent law principle, under which VTRs should be deemed staple articles of commerce because, as the District Court found, they are capable of and are actually being used for many noninfringing and legitimate purposes; and

(2) it erroneously expanded the doctrine of contributory infringement and ignored the factual findings of the District Court that the retailers (a) did not know and had no reason to know that their customers would infringe the copyrights in plaintiffs' works and (b) neither induced nor encouraged the allegedly unlawful copying.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT VTRS ARE STAPLE ARTICLES OF COMMERCE CAPABLE OF SUBSTANTIAL NON-INFRINGING USES

In a well-reasoned decision, the District Court held that a consumer's recording for at home, noncommercial viewing at a later time was not copyright infringement and that, even if it were, the sellers of VTRs would not be liable for the infringement on a direct, vicar-

ious, or contributory basis. Universal City Studios, Inc. v. Sony Corporation of America, 480 F. Supp. 429 (C.D. Cal. 1979). The District Court's holding was premised, at least in part, on its conclusion that VTRs are staple articles of commerce capable of many noninfringing uses.

The Court of Appeals reversed and held that the plaintiffs' copyrights in 32 works were infringed by consumers who used their VTRs to record the works for later viewing. The Court of Appeals also summarily held that the manufacturer, distributor, advertising agency and four retailers of Sony's Betamax brand VTR were contributorily liable for the infringements.[1]

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1. The Court of Appeals agreed with the District Court that the retailers' copying of portions of plaintiffs' works in order to demonstrate the capability of the VTRs was not a copyright infringement.

The Court of Appeals held that the patent law concept of "staple article of commerce" was inapplicable in a copyright infringement case and further found that, even if the doctrine were relevant, VTRs are not capable of substantial noninfringing uses.

We submit that the Court of Appeals is simply wrong, for the "staple article of commerce" concept embodies a principle clearly applicable here -- a manufacturer or seller should not be held contributorily liable for infringement if the goods are capable of substantial noninfringing uses. Thus, in patent law, liability can be assessed only if the defendant had knowledge that the use of the product would infringe a patent because the product was unsuitable for noninfringing uses.

Accordingly, in Aro Manufacturing Co. v. Convertible Top Replacement Co., Inc., 377 U.S. 476 (1964), this Court found contributory patent infringement liability because the manufacturer of customized automobile convertible top replacement fabrics knew that its product was suitable for use only in certain automobile convertible tops which infringed a patent. A majority of the Court there stressed that a finding of contributory infringement was appropriate only if the contributory infringer knew that the intended use would infringe a particular patent. See Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176 (1980).

In Henry v. A.B. Dick Company, 224 U.S. 1, 48 (1912), overruled on other grounds, Motion Picture Patents Co. v.

Universal Films Manufacturing Corp., 243 U.S. 502 (1917), the Court explained the reasoning underlying the staple article of commerce principle:

> [A] sale of an article which though adapted to an infringing use is also adapted to other and lawful uses is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce. There must be an intent and purpose that the article sold will be so used. Such a presumption arises when the article so sold is only adapted to an infringing use.

For the same policy reasons, this principle should be applied in copyright cases. Whereas a patent confers a monopoly for a limited time on the manufacture, use or sale of patented equipment, a copyright gives an author the exclusive right to prevent the

copying of a particular expression of an idea. Thus, if, as has been held, it would be an unwarranted broadening of the patent monopoly to hold a seller of an article that can be put to substantial noninfringing uses liable for patent infringement, so must it be an unwarranted extension of the copyright monopoly to declare that a seller of an article that can be used for many purposes other than illegal copying is liable for contributory infringement.

Moreover, the Court of Appeals misapplied the staple article of commerce standard in concluding that, even were the standard relevant, a VTR is not a staple article of commerce. The record below was replete with evidence showing the many uses to which VTRs can be put without any conceivable problem of

copyright infringement -- such as recording and viewing uncopyrighted material, recording and viewing material as to which the copyright owner has consented, viewing home movies recorded on a video camera, and viewing prerecorded tapes of various works.[2]

Based on the record evidence, the District Court unequivocally found that "[t]he videotape recorder, like a tape recorder, is a staple item of commerce. Its uses are varied." 480 F. Supp. at 458. The Court of Appeals summarily reversed this factual finding of the District Court. By substituting its views without finding the District

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2. See, e.g., R.T. 1742-3, 1769, 2300-1, 2328-9, 2436-7, 2442-8, 2481-7, 2511-6, 2540-52, 2564-87, 2593-2606, 2615-6, 2623-40, 2823-44, 2863-2902, 2912-23, 2929-39, 3007-18; Def. Exh. OT, PD, PE, PF, PG, PH, PI, PK.

Court's factual conclusions clearly erroneous, the Court of Appeals committed reversible error. As this Court recently made clear in Inwood Laboratories, Inc. v. Ives Laboratories, Inc., ___ U.S. ___, 50 U.S.L.W. 4592 (1982), a court of appeals is not free to ignore a district court's findings of fact. As the District Court concluded, because VTRs are capable of many noninfringing uses, they are staple articles of commerce and sellers of VTRs should not be held liable for contributory infringement.

II. THE COURT OF APPEALS ERRONEOUSLY EXPANDED THE DOCTRINE OF CONTRIBUTORY INFRINGEMENT.

The Court of Appeals held the retailers contributorily liable for the infringing activities of consumers, even though the retailers merely sold

VTRs capable of many legitimate, noninfringing uses. This holding is an unprecedented expansion of the doctrine of contributory infringement. The Court of Appeals and the District Court purported to apply the same legal standard, as both agreed that a "contributory infringer" is "one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another." Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted).

Measuring the facts in this record against this standard, the District Court found that the VTR sellers were not contributory infringers. That court determined, as a factual matter, that the retailers had no knowledge of

the infringing activity and that no evidence showed that they "in any way induced or caused to be made any of the copies at issue." 480 F. Supp. at 459. The District Court further noted that the VTR sellers "have neither the right nor the ability to control Betamax purchasers' use of the machine in their homes." Id. at 461.

The Court of Appeals flatly ignored these factual findings and held, without evidentiary support, that the VTR sellers possessed the requisite knowledge. It summarily concluded that "there is no doubt that appellees have met the other requirements for contributory infringement -- inducing, causing, or materially contributing to the infringing conduct of another." 659 F.2d at 957-6. Once again, by overturning the factual findings

of the District Court without finding them clearly erroneous, the Court of Appeals committed reversible error. Ives Laboratories, Inc., supra.

Moreover, the Court of Appeals also misconstrued the legal standards for contributory infringement, as developed by this Court and lower courts. The relevant cases demonstrate that a defendant can be held liable for contributory infringement only if he knew or should have known that the specific infringement was occurring and specifically caused or orchestrated the infringing activity.

The Ives Laboratories case is also instructive on this issue. Although the decision of the Court of Appeals was reversed on the narrow ground that it had wrongly set aside the findings of the

trial court, this Court took the opportunity to reiterate the standard for contributory infringement under trademark law:

> Thus, if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit.

50 U.S.L.W. at 4595. While not deciding the issue, the Court stated that, absent direct or imputed knowledge of specific infringements, the manufacturers of "look-a-like" generic drugs would not be held contributorily liable for infringements druggists committed by improperly substituting the generic drug for a trademarked drug, even though some number

of unlawful substitutions might be anticipated. Id., n.14. Thus, under the principle reiterated in Ives Laboratories, before a seller can be held liable for contributory trademark infringement, it must have induced the infringement or have reason to believe that the specific infringement will occur. This principle applies equally to copyright cases.

Thus, for instance, in Kalem Co. v. Harper Brothers, 222 U.S. 55 (1911), the defendant made a movie based on the copyrighted novel Ben Hur and sold the film to jobbers. It was found contributorily liable for the infringement that occurred when the movie was exhibited in theaters to which the jobbers had sold it, because the defendant obviously expected and intended that the specific infringing activity would occur.

Moreover, as further demonstrated in Universal Pictures Co., Inc. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947), a contributory infringer must be directly linked to the infringing act and know of it before liability will arise. In that case, a scriptwriter was held liable, as a contributory infringer, for his participation in writing the screenplay for a movie which infringed plaintiff's copyright. The writer knew that the infringement would occur, as he had copied from the copyrighted work in writing the screenplay.

Similarly, in Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971), a company which managed concert artists and organized concerts was held contributorily liable for the infringements committed by the concert artists. Central to

the finding of contributory infringement was the conclusion that the defendant helped to plan the concert programs and therefore knew the specific infringing works that would be performed.

Under the standards developed in these cases, a defendant will be held liable for contributory infringement if the factual circumstances demonstrate that he knew or had reason to know that the primary activity infringed plaintiff's copyrighted works and materially aided the infringing activity. Yet the record in this case contains no evidence showing that any of the VTR sellers intended or knew that consumers would use the VTRs to copy Universal's or Walt Disney's works, or encouraged copying of the plaintiffs' works.

Retailers have no control over or knowledge of the particular uses to

which consumers put goods they have purchased and should not be held liable, merely because they sold goods which consumers in the privacy of their homes might conceivably use for infringing activities. Under the Court of Appeals' flawed reasoning, sellers of cameras, photocopying machines and typewriters would be exposed to liability for copyright infringements committed by users of these machines. This Court should seize this opportunity to restore reason to the doctrine of contributory infringement.

CONCLUSION

For the above reasons, NRMA respectfully urges this Court to reverse the decision of the Court of Appeals, which failed to give due weight to factual findings of the District Court

and which misapplied the applicable legal standards.

Respectfully submitted,

Peter R. Stern
Berger, Steingut,
Weiner, Fox & Stern
150 East 58th Street
New York, New York 10155
(212) 980-1400

Attorneys for National
Retail Merchants
Association

Of Counsel:

Theodore S. Steingut
Robert A. Weiner

Amicus Brief

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE PFIZER INC. IN SUPPORT OF PETITIONERS

STEVEN C. KANY
(*Counsel of Record*)
235 East 42nd Street
New York, New York 10017
Attorney for Amicus Curiae
Pfizer Inc.

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No. 81-1687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SONY CORPORATION OF AMERICA, et al.,

Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC., and
WALT DISNEY PRODUCTIONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE PFIZER INC. IN SUPPORT OF PETITIONERS

Amicus curiae Pfizer Inc. ("Pfizer") submits this brief in support of Petitioners Sony Corporation of America, et al., and pursuant to the joint consent to the submission of briefs of amici curiae, previously filed with this Court by all parties. Pfizer adopts the arguments presented by Petitioners and by other amici curiae supporting Petitioners, and respectfully urges that this Court reverse the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on October 19, 1981, *Universal City Studios, Inc., et al.* v. *Sony Corporation of*

America, et al., 659 F. 2d 963 (9th Cir. 1981), and reinstate the opinion and judgment of the District Court, 480 F. Supp. 429 (C. D. Cal. 1979).

Interest of the Amicus Curiae

This action, the "Betamax Case," has become the most famous copyright case in history. It is also one of the most important. In holding non-commercial home recording of television programs to be a violation of the copyright laws, the court below has produced consequences that threaten to intrude into the privacy of millions of homes, to halt technological progress, and to injure a large segment of the national economy.

The interest of amicus curiae Pfizer Inc. arises out of its production and sale of magnetic particles used in the manufacture of electronic recording tapes, including videotapes. Because of its technological expertise in the rapidly growing electronic recording industry, Pfizer has found this business segment sufficiently attractive to justify the investment, over the past four years, of more than $80 million in construction of new and expanded research and production facilities in Easton, Pennsylvania, Valparaiso, Indiana, and East St. Louis, Illinois. At a time when the national average unemployment rate exceeds 9%, these facilities employ more than 350 workers in locations suffering even greater recession. Unemployment exceeds 11% in Easton, 14% in Valparaiso, and in East St. Louis, Pfizer is the last major employer still in business.

What television viewers use videotapes made with Pfizer's components for—time-shifting, archiving, home movies, pre-trial testimony, educational instruction—is something over which Pfizer has no control and makes no recommendation. What does concern Pfizer, however, is the very real possibility that the dispute at bar, involving a small number of parties, representing narrow industry

segments, and involving no actual injury, may produce economic disruptions extending to Pfizer and to thousands of workers throughout the nation and the world.

Pfizer's interest, therefore, is that of protecting its investment by urging this Court to apply the Copyright Act, 17 U.S.C., with the flexibility intended by Congress, in order to promote the goals intended by the Constitution, while taking account of the economic disruptions already caused by widespread recession. This will require reversing the arbitrary and unbending approach adopted by the court below.

Statement of the Case

This case involves the non-commercial home recording of copyrighted television programming by the use of videotape recorders ("VTRs") manufactured, sold, and advertised by Petitioners. This rapidly growing field has won wide acceptance by the viewing public because it allows through its principal use, time-shifting, a greater freedom and flexibility in gaining access to information and entertainment.

Respondents, producers of copyrighted television programs, allege that all off-the-air recording of their programs constitutes a violation of their copyrights, for which they are entitled to relief. Although Respondents' evidence at trial showed no actual injury, they have urged, nonetheless, that they are entitled to an injunction that would prohibit all arguably infringing home recording (and, inescapably, noninfringing recording as well), or to statutory damages or an accounting of Petitioners' profits. All or any of these remedies would likely put Petitioners out of business, and would severely affect Pfizer and numerous other related and dependent businesses.

Because the individual viewers who are actually involved in recording copyrighted television programs (or

in the many other, clearly noninfringing, uses of VTR equipment) are not readily identifiable or susceptible to suit without enormous expense and massive invasions of privacy, Respondents sued the more compact target of the manufacturers, sellers and advertisers of VTR equipment, charging them with contributory infringement.*

Respondents argue that in spite of the fact that they have prospered since the advent of the VTR era, home video recording does inflict at least a theoretical injury—that time-shifting, recording a program for viewing at a later time, would preempt the viewing of a later program; that archiving will result in smaller audiences for broadcast reruns, which will in turn reduce advertising revenues, and thus lower the prices Respondents can command for copyrighted programming; and that archiving will also result in smaller audiences for later theater revivals of recorded broadcast films.

The District court made extensive and detailed findings of fact, concluding, as to the first argument, that because most home recording is for time-shift purposes, it actually benefits respondents; that the second argument is flatly contradicted by Respondents' trial evidence; and that the third is entirely speculative. Because of the lack of proof of any injury to Respondents, the impossibiilty of equitable enforcement as against those who are actually recording off the air, and the drastic economic and social consequences of squelching an entire industry, the District Court found non-commercial home recording to be a fair use of the recorded programs. *Universal City Studios, Inc., et al.* v.

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* A similar action against most of the other videotape and VTR equipment manufacturers and advertisers is now pending in the District Court. *Universal City Studios, Inc.* v. *RCA Corporation, et al.*, 81 Civ. 5723 (C.D. Cal., filed November 6, 1981), and a second, similar action against Petitioners herein has been commenced by Respondents. *Universal City Studios, Inc.* v. *Sony Corporation of America, et al.*, 82 Civ. 3271 (C.D. Cal., filed June 28, 1982).

Sony Corporation of America, et al., 480 F. Supp. 429 (C.D. Cal. 1979).

The Court of Appeals for the Ninth Circuit reversed, 659 F. 2d 963 (9th Cir. 1981), giving no weight to Respondents' lack of injury, or to the drastic social and economic consequences of its holding, or to Congress's intent to provide a broad and flexible fair use exemption, or to the policy of the Copyright Clause of the Constitution, Art. I,. sec. 8, cl. 8, "to promote the Progress of Science and the useful Arts." Instead, the court completely ignored the trial court's detailed findings of fact and insisted on a literal application of an arbitrary rule of law not contained in the Copyright Act, with inequitable and potentially disastrous consequences.

Summary of Argument

Although numerous grounds for reversing the Court of Appeals's decision are presented in the briefs of Petitioners and of other amici curiae, this brief will focus on the application of the fair use exemption to non-commercial home recording.

Point I below will show that the non-commercial home recording at issue here is the kind of use that the courts have traditionally held to be a fair use because of the lack of harm resulting to copyright owners and because of the overall policies of the Constitution relating to the grant of copyrights and to the free flow of information.

Point II will show that application of each and all of the four tests for fair use contained in Section 107 of the Copyright Act of 1976, 17 U.S.C. § 107, also compels the conclusion that non-commercial home recording should be held to be a fair use.

Point III will show tht the legislative history of the Copyright Act of 1976, and particularly of Section 107,

demonstrates that Congress specifically considered the issue of home recording of both audio and video materials and specifically intended to exempt such recording from the reach of the copyright laws.

Finally, Point IV will show that the detailed findings of fact made by the trial court, and upon which it based its conclusion that non-commercial home recording is a fair use, should be held to control in the light of the Court of Appeals's failure to credit them properly and its erroneous application instead of an incorrect rule of law.

ARGUMENT

I. Case law principles and the constitutional policy of promoting science and the useful arts compel the conclusion that non-commercial home recording is a fair use.

Article 1, section 8, clause 8, of the Constitution empowers the Congress "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their writings and Discoveries . . ."

The very sentence structure of the Constiution shows that its focus is on the "progress of science and the useful arts," and not on the reward to authors or inventors or the value or strength of a copyright. A copyright is only a means to an end, and the public weal is given precedence over the prosperity of authors.

This brief is not the proper forum for a treatise on the continuing role of the idea of progress in the legal, social and economic history of the United States; suffice it to note that progress is the key word in the Constitutional provision quoted above. The First Amendment offers additional means of furthering progress and the common weal, by encouraging the widest possible dissemination of information and ideas to the public.

These preliminary observations are of critical importance in resolving the issues presented here because this case involves at least two aspects of the progress of science and the useful arts—Respondents' copyrighted television programs *and* Petitioners' VTR technology. The result in this case will affect not only the home recording at issue, but all of the other, clearly non-infringing uses for VTR technology that may be impaired if the decision below is allowed to stand. Neither form of progress should be unduly restricted; nor is it likely that either will be if non-commercial home recording is left unimpeded. After all, the evidence shows that home recording for time-shift purposes aids in promoting the widest possible dissemination of copyrighted programs, and it thereby promotes not only both aspects of progress at issue, but also both of the principal Constitutional policies involved.

A copyright can be a two-edged sword, promoting some forms of progress while suppressing others. While protecting the work to which it attaches, it can also restrict the expression and flow of information, ideas, and opinions. The degree to which exclusivity of a copyright is enforced must therefore be carefully balanced. Monopolies were no more favored at the time the Constitution was drafted than they are today. The Copyright Clause permits Congress to act in spite of that disfavor, where such an incentive is found necessary to further the goals of progress contained in Article I of the Constitution; but the grant of a monopoly must be subject to those goals, and should not be permitted to impinge on other, equally important policies.

Hence, the exclusive rights granted by Section 1 of the Copyright Act of 1909, 17 U.S.C. § 1 (1909), and by Section 106 of the Copyright Revision Act of 1976, 17 U.S.C. § 106 (1976), have been construed by the courts to be subject to certain restrictions in the interests of fairness or of policy. One result has been the doctrine of fair use, described by

the court in *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), as:

> "a privilege in others than the owners of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner." [366 F.2d at 306.]

More specifically, the fair use doctrine was developed by the courts as a sort of rule of reason to act as a safety valve for this purpose. In *Meeropol* v. *Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), the court described fair use as:

> "a means of balancing the exclusive right of a copyright holder with the public's interest in the dissemination of information affecting areas of unusual concern, such as art, science, history or industry." [560 F.2d at 1068.]

Similarly in *Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided Court*, 420 U.S. 376 (1975), the Court of Claims reiterated the view of the House Committee that drafted the 1909 Copyright Act, that:

> "copyright was '[n]ot primarily for the benefit of the author, but primarily for the benefit of the public.' H.R. Rep. No. 2222, 60th Cong., 2d Sess., p. 7. The Supreme Court has stated that 'The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.' *Mazer* v. *Stein*, 347 U.S. 201 . . ." [487 F.2d at 1352.]

In practice, this subordination means that copyright holders may not be able to achieve the maximum financial benefit from their monopoly, a circumstance recognized

and accepted in *Meeropol* v. *Nizer, supra.* At the trial level, 417 F.Supp. 1201 (S.D.N.Y. 1976), the court said:

> "there are occasionally situations in which the copyright holder's interest in a maximum financial return must occasionally be subordinated to the greater public interest in the development of art, science, and industry." [417 F.Supp. at 1206.]

Virtually identical language was used in *Rosemont Enterprises, Inc.* v. *Random House, Inc., supra,* 366 F.2d at 307, quoting *Berlin* v. *E.C. Publications Inc.,* 329 F.2d 541, 544 (2d Cir.), *cert. denied,* 379 US 822 (1964), to illustrate the point that the mere fact that a copyright owner might be deprived of the maximum financial return is not sufficient to overcome a finding of fair use where larger policies are at stake.

Thus, in *Twentieth Century Music Corp.* v. *Aiken,* 422 U.S. 151 (1975), this Court explained:

> "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." [422 U.S. at 156; footnotes omitted.]

Most fair use cases involve a so-called "productive" use, "the use by a second author of a first author's work," as in a quotation for purposes of criticism, comment, scholarship, or the like. *See,* 17 U.S.C. § 107; Pet. App. 14-15, *and* authorities there cited. Numerous exceptions have extended fair use to include "intrinsic" uses such as that approved in *Williams & Wilkins Co.* v. *United States, supra,* or the less dramatic, but none the less "intrinsic" (and commercial) uses approved in *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.,* 626 F.2d 1711 (5th

Cir. 1980); *New York Times Co.* v. *Roxbury Data Interface, Inc.*, 434 F.Supp. 217 (D.N.J. 1977); and *Time, Inc.* v. *Bernard Geis Associates*, 293 F.Supp. 130 (S.D.N.Y. 1968).

The rationale for the cases cited in the preceding paragraph becomes apparent when they are contrasted with such cases producing opposite results as *Meeropol* v. *Nizer, supra; Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Eisenschiml* v. *Fawcett Publications, Inc.*, 246 F.2d 598 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957); *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Companies, Inc.*, 621 F.2d 57 (2d Cir. 1980); and *Marvin Worth Productions* v. *Superior Films Corp.*, 319 F.Supp. 1269 (S.D.N.Y. 1970). The distinction is that in the former cases a public policy goal was promoted by the copying, whether or not the use was "productive" or "intrinsic," whether or not the copier's motivation was commercial, and whether or not the copyright owner suffered economic injury. These policy goals include the progress of medical science (*Williams & Wilkins*); increased understanding of significant historical events (*Bernard Geis*); greater access to information *archives* (*Roxbury Data Interface*); and enhanced competition (*Triangle Publications*).

On the other hand, the cases refusing to declare the use at issue fair all involve a commercial exploitation by which the copier seeks to substitute the copy for the original, thereby diverting an economic return on copyrighted material from the copyright owner to himself, and in the process adding no net again in progress, dissemination, or access to the public.

Applying the rule thus derived to non-commercial home video recording, it is clear that the result is to promote dissemination of VTR technology, to promote dissemina-

tion of Respondents' programs in the very manner they intended, to take away no economic advantage from Respondents, to obtain no economic advantage for the VTR user, and, when tapes are erased after viewing, to minimize or eliminate entirely whatever residuum of purely theoretical harm may result from the fact of copying at all.

The ephemeral nature of broadcast programming gives rise to some awkwardness in applying guidelines, especially the sort set forth in Section 107 of the Copyright Act, 17 U.S.C. § 107. This awkwardness results from the fact that the statute is a codification of case law, which in turn deals most frequently (and most effectively) with the most traditional medium—print. With varying degrees of wrenching or stretching, the statutory and common law fair use tests can be applied to works in other media, but the process is most strained when the subject is a work that is apprehended visually—instantaneously and as a whole—such as a statue or a painting, rather than linearly or in parts, such as a printed text. Thus, a short quotation for fair use in a review might involve a paragraph from a book; but how does one make similarly limited use of a statue or painting? Does a short quote consist of a bronze arm or a square inch of convas, or is it an entire statue or painting, but seen only for a moment, or in miniature, or in monochrome?*

Visually apprehended materials, including television broadcasts, must be treated differently from books because they are received and apprehended differently by their audience. Forbidding the non-commercial home recording of a television broadcast so that the viewer or his family can see it later or see it again is most analogous to for-

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* This analysis, calling for differing standards for determining fair use depending on the medium in which a copyrighted work is produced, is undertaken more fully in S. Timberg, "A Modernized Fair Use Code for the Electronic As Well As the Gutenberg Age", 75 Nw. U.L. Rev. 193, 203-16 (1980).

bidding the purchaser of a book to reread it or to allow others in his family to read it. Home recording would be analogous to infringing activities like copying or republishing a book only if it involved rerecording, or selling or leasing the copy, or showing it or rebroadcasting it commercially. But the home television recorder's activity in this case is, by definition, private and noncommercial and is thus more analogous to rereading a page or a chapter of a book, or merely putting off reading the book until sometime after purchasing it, none of which has ever been regarded as a copyright infringement. To regard time-shift recording followed by erasure as an infringement is analogous to requiring that a book be read immediately upon purchase or not at all. Yet because most home VTR copies are erased within a short time, even this unwarrantedly narrow view of copyright is honored.

At the same time, the fact of such erasure enhances the distinctions between print and more ephemeral media. This further demonstration of the inappropriateness of traditional, print-oriented analysis is caused by addition of a time factor that actually reduces the danger that home use may not be fair by assuring—as the evidence in the record shows—that the risk of commercialization is eliminated by erasure. Such a will-o-the-wisp is the recording soon erased, and so limited is its function, that it should no more be regarded as a "copy" than the amplification by a CATV station or the reception by a restauranteur's radio should be regarded as performances. *See Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Twentieth Century Music Corp.* v. *Aiken, supra,* respectively.

The public benefit to be derived from the progress of science and the useful arts as represented by Petitioners' VTR technology is threatened by the Court of Appeals's decision, whereas the aspect of such progress repre-

sented by Respondents' copyrighted television programming is neither threatened nor impaired by non-commercial home video recording. One form of such Constitutionally favored progress ought not to be scrificed to another by imposition of a destructive and entirely unnecessary remedy when both can—and do—flourish. See *Time, Inc.* v. *Bernard Geis Associates, supra.*

An establisehd industry that answers the needs and desires of the public and of the Constitution, as exercised in the privacy of individual homes, without the least demonstrated harm to copyright owners, cannot be taxed without gross inequity, cannot be policed without drastic invasions of privacy, and cannot be prohibited without massive and unnecessary economic disruptions.

For these reasons the opinion and judgment of the Court of Appeals should be reversed and the judgment of the District Court should be reinstated.

II. Application of the four factors in Section 107 compels the conclusion that non-commercial home recording is a fair use.

Section 107 of the Copyright Act, 17 U.S.C. § 107, provides that:

> "In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

The statutory direction is clear. All of the enumerated factors must be considered, and others may be considered in addition. The statute does not say that any one factor is or may be conclusive, nor does it suggest what relative weights they are to be given. This openness is consistent with the equitable nature of the inquiry, the variety and unpredictability of factual situations, and the flexibility determined by Congress to be appropriate in resolving fair use issues. *See,* Point III below.

Application of each and all of the factors quoted above requires a reversal of the judgment of the Court of Appeals, as well as a disapproval of its reliance on a single factor (the first), and an erroneous view of it at that.

1. *The purpose and character of the use (17 U.S.C. § 107(1)).* Non-commercial home recording is in no way designed to harm Respondents or to profit at their expense or to do anything other than to receive and view, perhaps later, perhaps more than once, programs broadcast freely and without restriction for precisely such reception and viewing.

Home recording is not undertaken with any commercial motive and especially not with any intent to compete with Respondents. *Compare, Iowa State University Research Foundation* v. *American Broadcasting Companies, Inc.; Wainwright Securities Inc.* v. *Wall Street Transcript Corp.,* both *supra.* A commercially motivated purpose to *compete* with Respondents by substituting the home-recorded copy for the original would involve the kind of "intrinsic" use the Court of Appeals might properly have been concerned with in this case (*See* Pet. App. at 18-19), even though at least one other court has refused to take such a doctrinaire approach. *Williams & Wilkins Co.* v. *United States, supra.*

But in considering and determining to exempt home recording, Congress refused to adopt so simplified a notion of "intrinsic" use. Indeed, *Williams & Wilkins* was

decided before the 1976 Copyright Act was passed, and was thus included as a part of the case law Congress intended Section 107 to codify. Moreover, the four factors listed in Section 107 are taken directly from the *Williams & Wilkins* opinion, *supra*, 487 F. 2d at 1352. *See also*, Point III below. In fact, the kind of economic inquiry that leads to a proper condemnation of commercially competitive intrinsic use is utterly inapposite to the peculiar posture of the parties in this case, where the intention of Respondents is to broadcast their copyrighted work as widely as possible to the public for free and unrestricted reception, while the Petitioners are not even involved in the actual home recording at issue.

Numerous courts have considered a second class of cases involving a commercially motivated use not done in order to compete directly with the copyright owner. *E.g., Triangle Publications, Inc.* v. *Knight Ridder Newspapers, Inc.; New York Times Co.* v. *Roxbury Data Interface, Inc.; Time, Inc.* v. *Bernard Geis Associates*, all *supra*. In all of these cases, in spite of a commercial motive, the courts determined that the use involved was fair. Where, as in the instant case, the use is not only not in competition with Respondents, but cannot in any manner be characterized as commercial, then *a fortiori* it should be a fair use, whether or not "intrinsic."

In addition to the intent and economic effect of the use, its physical and temporal nature—an electronic recording soon erased—is so ephemeral and insubstantial as barely to rise to the level of a "copy" at all. *See* Point I above.

2. *The nature of the copyrighted work (17 U.S.C. § 107(2))*. The nature of the Respondents' copyrighted programs is one which has been produced for sale at a profit, which has been sold, and on which any profit that can be made will be made utterly independently of the viewers' acts—whether or not the program is recorded or

seen at all. Thus any case involving commercial or competitive copying cannot be relevant here because the harm in such a case arises from a diversion of revenues from the copyright owner to the copier. *See, e.g., Meeropol* v. *Nizer; Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, both *supra.*

Respondents' programs are freely broadcast for reception by anyone possessing a television set, without limitation and without charge.* The benefit to Respondents is greater with a larger audience, and to the extent that time-shifting produces a larger audience for their programs (and for accompanying commercials), Respondents *benefit* from home recording. Because the record in this case shows that by any measure the vast majority of home recording is done for time shifting, any suggestion of harm is nullified.

Finally, the copyrighted works at issue here are ones designed to be broadcast into individual homes and received and viewed there in private. Unless some feature of that reception and viewing, whether or not immediately upon reception, and whether or not more than once, can be shown to cause some harm to Respondents the inquiry should stop at the door of the viewer's home. The property rights of Respondents are not the only values at issue, and because no compelling need or loss of Respondents has been shown, no grounds exist for disrupting activities done in the privacy of individual homes to enforce an unnecessary regulation.

3. *The amount and substantiality of the portion used in relation to the copyrighted work as a whole (17 U.S.C. § 107(3)).* In this case, of course, it is virtually entire. But as Judge Wyatt made clear in *Time, Inc.* v. *Bernard*

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* Of course, the public does pay for programming indirectly through higher prices for goods advertised on the commercial television stations that purchase Respondents' programs.

Geis Associates, supra, 293 F.Supp. at 144, in discussing the substantial use found not to be a fair use in *Folsom* v. *Marsh,* 9 Fed. Cas. 343, No. 4901 (C.C. Mass. 1841), the mere fact that the proportion of the whole used was substantial is not the controlling factor; rather, "the test of fair use was primarily the degree of injury to the plaintiff." Home recording of the entirety of a program, including commercials,* actually ensures that Respondents' intent is carried out through free and unrestricted home reception by the widest possible audience. In any event, as the Court of Claims stated in *Williams & Wilkins Co.* v. *United States, supra,* 487 F.2d at 1353: "There is, in short, no inflexible rule excluding an entire copyrighted work from the area of 'fair use.' "

4. *The effect of the use on the potential market for or value of the copyrighted work, 17 U.S.C. § 107(4).* This is the factor that the courts have consistenly held to be the most important. *E.g., Triangle Publications, Inc.* v. *Knight Ridder Newspapers, Inc., supra,* 626 F.2d at 1175; *New York Times Co.* v. *Roxbury Data Interface, Inc., supra,* 434 F.Supp. at 223.

In this case the effect on the market for or value of Respondents' copyrighted works is zero. This is shown by logic, by Respondents' trial evidence and admissions, and by the continued uncomplaining payment by advertisers for commercial television time, without adjustment for the supposed effects of home videotape libraries or of any other aspect of home recording. Indeed, because the time-shift use of video recording actually increases the viewing audience, and far outweighs other allegedly infringing uses, the VTR provides a net benefit to Respondents, and

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* Home recording has no effect on the reception of commercials. To edit out commercials the viewer must watch and record the program at the time it is broadcast and must pay particular attention to commercials in order to activate the VTR on-off switch, an attention not required by ordinary viewing. Such erasure of commercials is not possible during automatic time-shift recording.

another reason for characterizing such recording as a fair use. *See, Time, Inc.* v. *Bernard Geis Associates, supra,* 293 F.Supp. at 146.

Application of the statutory tests for fair use in the manner outlined above may require some flexibility; but that is precisely what Section 107 prescribes and is entirely consistent with the House Committee's caution that it had "no disposition to freeze the doctrine [of fair use] in the statute, especially during a period of rapid technological change." H.R.Rep. No. 94-1476, 94th Cong., 2d Sess., at 66 (1976). On the contrary, this case provides an extraordinarily apt vehicle for employing the fair use provision in precisely the manner and spirit envisioned by the Congress, required by the Constitution, and compelled by the realities of technological advance.

III. The legislative history of the Copyright Revision Act shows that Congress intended non-commercial home recording of both audio and video materials to be fair use.

The Ninth Circuit's refusal to consider and to give effect to the legislative history of the Copyright Revision Act was error. *Train* v. *Colorado Public Research Group,* 426 U.S. 1 (1976).

Indeed, the Court of Appeals's reason for refusing to consider the legistative history—that it is not necessary to do so when the meaning of the statute is clear [Pet. App. 11-12]—is erroneous on two counts. First, even when a statute appears to be clear, the inquiry will aid in confirming that conclusion. More importantly in this case, however, the Court of Appeals missed the point that the fair use provision, Section 107, was intentionally left open and ambiguous in order to allow the courts to adapt the reach of the exemption in the light of anticipated technological change—in short, to do exactly what the District Court did. Thus, the final House report on the 1976 Act stated:

> "[T]he endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute . . .[T]here is no disposition to freeze the doctrine [of fair use] in the statute, especially during a period of rapid technological change . . .[T]he court must be free to adapt the doctrine to particular situations on a case-by-case basis." [H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 66; Pet. App. 67.]

Had the Court of Appeals undertaken an unbiased inquiry into the legislative history it would have reached the conclusion of the trial court, that Congress considered the issue of non-commercial home recording of audio *and* video materials and determined that both should be regarded as fair use because such copying is not commercial, not injurious, and not controllable.

The trial court's examination of the legislative history is reproduced at Pet. App. 58-65, and will be discussed below only insofar as required to refute the Court of Appeals's contentions that such an inquiry is not necessary and that the references to home recording at the time of the 1971 amendment are "entirely beside the point." Pet. App. at 11. To the contrary, this Court has recognized that so long as "the essence of the legislation remain[s] constant," legislative proceedings spanning a lengthy period of time are "relevant to a full understanding of the final legislative product." *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 204 (1980).

The Copyright Revision Act of 1976 was the culmination of a lengthy process dating back as far as 1955, when Congress commissioned a study of copyright issues. That study, done by Alan Latman, noted that although the question had not previously been dealt with by Congress or the courts, the prevailing view among commentators appeared to be that "anyone may copy copyrighted materials for the purposes of private study or review," and

that "private use is completely outside the scope and intent of restriction by copyright." A. Latman, "Fair Use of Copyrighted Works", Senate Judiciary Comm. Study No. 14, 86th Congress, 2d Sess., at pp. 11-12.

In 1961, the Report to Congress of the Register of Copyrights predicted that:

> "New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright." [Register of Copyrights, Report on the General Revision of the U.S. Copyright Law 5, 86th Cong., 1st Sess. (Comm. Print 1961).]

As the drafting process was extended by the political process, Congress was still not yet ready to enact a full revision in 1971, when it became apparent that an interim legislative remedy for record piracy was necessary. This 1971 amendment, The Sound Recording Act of 1971, P.L. 92-140, 85 Stat. 391 (1971), was intended as a part of the then pending overall copyright revision, and it was anticipated that it would be reincorporated into the final general revision when that was eventually enacted. S. Rep. No. 72, 92nd Cong., 1st Sess. at 7-8 (1971). This indeed proved to be the case.

The Congress's closer focus on the recording industry at the time of the 1971 amendment called for inquiry into the particular application of certain principles previously considered only in general terms, including issues of home recording and fair use. It was in this context that the now famous colloquy occurred betweeen Rep. Beister and Barbara Ringer, then Assistant Register of Copyrights, in which the latter went on to refer to the impossibility of controlling *video* recording or "going into anyone's home and preventing this sort of thing, or forcing legislation

that would engineer a piece of equipement not to allow home taping." The colloquy then continued:

> "MR. BEISTER: Secondly with respect to video cassettes, are we approaching an additional problem, *not with respect to private use,* but with respect to public distribution after it has been retrieved over a home set?
>
> "MISS RINGER: The answer is very definitely, "yes." For years the motion picture industry has been faced with bootlegging problems . . . [that are] going to undergo a quantum increase when video cassette recorders are freely available. But I would say there is a big difference, and I think it is something you might consider. In that area [bootlegging], they have got copyright protection, and in *this area* [*private home recording*], *who knows? It is certainly not protectable under the Federal statute."* [Hearings on S. 646 and H.R. 6927 Before Subcommittee No. 3 of the House Judiciary Committee, 92nd Cong., 1st Sess. at 22-23 (1971), Pet. App. at 62, 63; emphasis added.]

The now equally famous colloquy between Reps. Kazen and Kastenmeier, in which home recording was specifically stated to be exempted by fair use, also occurred in this context, including Rep. Kazen's specific reference to television:

> "MR. KAZEN:. In other words, if your child were to record off a program which comes through the air on the radio *or television,* and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?
>
> "MR. KASTENMEIER: This is not included in this bill . . . . On page 7 of the report, under 'Home Recordings,' Members will note that under the bill the same practice which prevails today is called for; namely, *this is considered both presently and under the pro-*

> *posed law to be fair use.* The child does not do this for commercial purposes. This is made clear in the report." [117 Cong. Rec. 34748-49 (October 4, 1971); Pet. App. 64; emphasis added.]

The report referred to by Rep. Kastenmeier, H.R. Rep. No. 487, 92nd Cong., 1st Sess. (1971), stated:

> "Home Recording
>
> "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing Title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." [*Id.*, at 7; Pet. App. 60-61.]

The views of Rep. Kastenmeier and Miss Ringer are, of course, entitled to great weight in the light of their respective positions as committee chairman, floor manager, and legislative sponsor, and as administrative expert witness for both the 1971 amendment and the 1976 Copyright Revision Act. *See, Simpson* v. *United States,* 435 U.S. 6, 13 (1978); *and* cases cited at Pet. App. 62n.

From the foregoing and from the analysis undertaken by the District Court (Pet. App. 58-65), it is clear that the legislative history, if consulted, establishes at least the following points:

1. The effort to revise the copyright laws was a single legislative process of which the 1971 record piracy amend-

ment was an integral part, specifically seen as such both before and after its enactment. By the force of circumstance, that amendment was considered and enacted out of sequence, but it was intended to be, and was thereafter, reintegrated into the final whole. Hence, the 1971 legislative history cannot be considered in isolation, but is rather to be seen as coloring the entirety of the process, including the development of Section 107. It is by no means "beside the point."

2. Congress specifically considered non-commercial home recording of both audio and video materials.

3. Congress specifically intended that the law governing home recording, a practice "common and unrestrained today [in 1971]," H.R. Rep. No. 487, *supra,* at 7, Pet. App. 61, not be frozen, "especially during a period of rapid technological change." H.R. Rep. 94-1476, *supra,* at 66, Pet. App. 67.

4. Congress specifically intended home recording to be a fair use, whether or not it is characterized as an "intrinsic" use, because it is (a) non-commercial, and (b) not controllable without raising the spectre of unacceptable invasions of privacy. The former reason merely restates the conclusion that the balance of equities shows neither harm to the copyright owner nor the user's intent to profit or to inflict harm. The latter reason may be more a concession to practical reality than an example of doctrinal purity, but that is the price to be paid for a political process of legislation. It is not the only instance in which copyright is made subservient to some other policy or value and it is certainly not sufficient to justify the Court of Appeals's determination to ignore the intent of Congress.

Given the establishment of these points, as well as the demonstrated intent of Congress to leave the statutory fair use test flexible enough to accommodate both unforeseen fact situations and technological change, it is imma-

terial that one or more of the four factors listed in Section 107 might not fit this case with mathematical precision. Congress has still given sufficient guidance to allow the work of the courts to be done correctly. The Court of Appeals's refusal to heed that guidance requires reversal.

IV. The Court of Appeals's refusal to credit the District Court's findings of fact and its application of an erroneous rule of law to the fair use issue both require reversal.

Rule 52(a) of the Federal Rules of Civil Procedure states that findings of fact shall not be set aside unless clearly erroneous.

Both Congress and numerous courts have held that the issue of fair use is a question of fact, to be determined on a case-by-case basis, and upon a balancing of the equities. *See, e.g., Eisenschiml* v. *Fawcett Publications; Meeropol* v. *Nizer,* both *supra.* The District Court followed this approach and achieved a reasoned and correct result; the Court of Appeals did not.

In *Meeropol* v. *Nizer, supra,* the court stated:

> "The line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria." [560 F.2d at 1068.]

This is wholly consistent with the view of Congress, expressed in the House Report accompanying the Copyright Revision Act:

> "[S]ince the doctrine [of fair use] is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." [H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 65 (1976)].

Courts of Appeals have held that the "clearly erroneous" standard of review in Rule 52(a) of the Federal Rules of Civil Procedure applies to fair use determinations. *Eisenschiml* v. *Fawcett Publications; Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, both *supra.*

After five weeks of trial in the case at bar, the District Court, sitting without a jury, made extensive and detailed findings of fact, filling more than thirty pages of the Petitioners' Appendix (Pet. App. 35-54, 75-87). After considering these facts, the court concluded that the use made of Respondents' copyrighted television programming by non-commercial home recording was fair. This conclusion involved a balancing of equities, rather than the application of arbitrary rules or fixed criteria. Both the result and the procedure by which it was reached were meticulous, complete, and correct; they were in conformity with the standards laid down by both the courts and Congress for making such determinations; and they were consistent with the policies of the Copyright Act and of the Constitution.

On appeal, the Ninth Circuit committed two flagrant errors that require reversal by this Court. First, it ignored entirely the findings of fact made by the District Court; and secondly, it reached its result by application of a single arbitrary rule—that an "intrinsic" use can never be a fair use (Pet. App. 18). This rule is contrary to the mandate of Section 107 of the Copyright Act, 17 U.S.C. § 107; contrary to the intent of Congress in avoiding any arbitrary standards; and contrary to the only significant precedent, *Williams & Wilkins Co.* v. *United States, supra.* Resort to such a rule is contrary to the accepted practice for determining fair use issues; and application of the rule requires a disregard of the contrary findings of fact by the District Court, in violation of the mandate of Rule 52(a) of the Federal Rules of Civil Procedure. These errors require reversal.

Conclusion

For the reasons stated above, the opinion and judgment of the Court of Appeals should be reversed and the judgment of the District Court should be reinstated.

Respectfully submitted,

STEVEN C. KANY
(Counsel of Record)
Attorney for Amicus Curiae
Pfizer Inc.

August 27, 1982.

Amicus Brief

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No. 81-1687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SONY CORPORATION OF AMERICA, *et al.*,
Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC., AND
WALT DISNEY PRODUCTIONS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

JAMES F. FITZPATRICK *
CARY H. SHERMAN
HAMISH R. SANDISON
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700
Attorneys for Amicus Curiae
Recording Industry Association of America, Inc.

Of Counsel:
ERNEST S. MEYERS
MEYERS, TERSIGNI,
KAUFMAN, DEBROT,
FELDMAN & GRAY
630 Third Ave.
New York, N.Y. 10017
(212) 953-9000

* *Counsel of Record*

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IN THE

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SONY CORPORATION OF AMERICA, *et al.*,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICUS CURIAE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

The Recording Industry Association of America, Inc. (hereinafter "RIAA") hereby submits this brief *amicus curiae* in support of the respondents.[1]

INTEREST OF AMICUS CURIAE

RIAA is a nonprofit New York corporation, whose membership consists of record companies accounting for more than 90 percent of the authorized prerecorded records and tapes manufactured and sold in the United States. Among RIAA's basic purposes is to represent its membership before legislative, regulatory and judicial bodies with respect to federal, state and local legislation and regulations affecting the entire recording industry. Thus, RIAA is intimately acquainted with the federal copyright law as it pertains to sound recordings.

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[1] The consents of the parties are on file with the Clerk of the Court.

RIAA's purpose in submitting this brief is to assist the Court in considering the current legal status of off-the-air taping of sound recordings by individuals in their homes for private noncommercial use. While the question of home audio recording is not directly before the Court, the petitioners and several *amici* supporting them rely upon the legislative history of the Sound Recording Amendment of 1971 in their effort to overturn the decision of the Court of Appeals for the Ninth Circuit. Moreover, the District Court relied upon the same legislative history in concluding that off-the-air taping of audiovisual works by individuals in their homes for private noncommercial use was not an infringement of copyright.

SUMMARY OF ARGUMENT

Legal analysis of home audio recording reinforces the Ninth Circuit's conclusion that off-the-air copying of audiovisual works in the home infringes the copyright owner's exclusive right of reproduction. In the first place, this analysis refutes the petitioners' claim that the legislative history of the Sound Recording Amendment of 1971 establishes that home video recording is "fair use" under the Copyright Act of 1976. Second, the same analysis confirms the Ninth Circuit's opinion that there is no exemption for home video recording under the 1976 Act.

I.

The legislative history of the Sound Recording Amendment of 1971 does not show that Congress considered home recording to be "fair use" under the Copyright Act of 1976, as the petitioners erroneously contend. Section 107 of the 1976 Act—the fair use provision—does not even refer to home recording, and the legislative history accompanying it contains no suggestion that Congress intended or believed home recording to be fair use. On the contrary, section 107 gives examples of the creative uses traditionally considered fair, and specifically directs

the courts to consider four criteria in determining whether a particular use is a fair use. Home recording is not a creative use, and it is not even mentioned in the statutory criteria. Thus, the *per se* rule of fair use claimed by the petitioners is without foundation under current law.

II.

The Court of Appeals for the Ninth Circuit was correct in concluding that there is no home video recording exemption under current law by analogy with an alleged "home audio recording exemption." Significantly, neither the petitioners nor the *amici* supporting them attempt to defend such an absolute exemption.

The District Court erred in holding that the Sound Recording Amendment of 1971 created a purported home audio recording exemption. The 1971 Amendment was intended to deal with the problem of commercial record piracy, not home taping. There was no mention of a home taping exemption either in the Amendment itself or in the Senate proceedings relating to it. The references to home recording during consideration of the 1971 Amendment by the House of Representatives did not suffice to create—and were not intended to create—a home audio recording exemption.

Moreover, the District Court erred in holding that a supposed home audio recording exemption was incorporated *sub silentio* into the Copyright Act of 1976. Neither that Act nor its legislative history contains any such exemption. The language, structure and legislative history of the 1976 Act all confirm that Congress did not intend to exclude home audio recording from the scope of the copyright owner's exclusive right of reproduction.

Accordingly, both video and audio home recording are fully subject to copyright infringement liability in the absence of a valid defense.

ARGUMENT

The District Court concluded that home video recording does not constitute copyright infringement under current law. 480 F. Supp. at 442. This conclusion was based upon two alternative lines of reasoning.

First, the District Court reasoned that: (1) the legislative history of the Sound Recording Amendment of 1971 expressed a congressional intent to exempt home audio recording from infringement liability; (2) this legislative intent was incorporated into the Copyright Act of 1976; and (3) this intent is applicable to home recording of audiovisual works as well as home recording of sound recordings. 480 F. Supp. at 443-46. Second, as an alternative basis for its decision, the District Court reasoned that home video recording is "fair use" under the four criteria set forth in the current statute. 480 F. Supp. at 446-56.

The Court of Appeals for the Ninth Circuit rejected both lines of reasoning. It held that (1) neither the 1976 Act nor its legislative history provides for "a broad based home use exception," 659 F.2d at 968, and (2) home video recording does not constitute fair use under the 1976 Act, 659 F.2d at 969-74.

The petitioners in their brief do not attempt to defend the District Court's conclusion that the legislative history of the 1971 Amendment amounts to an absolute home recording exemption apart from the fair use defense. Instead, they assert that "[b]y 1971 . . . Congress had manifested clearly its belief and intention that all such [audio and video] home recording was *fair use*." Petitioners' Brief at 32 (emphasis in the original).

The following analysis of the legal status of home audio recording negates the petitioners' claim that the legislative history of the 1971 Amendment predetermines the fair use issue, and provides additional support for the Ninth Circuit's conclusion that there is no exemption for home video recording under the 1976 Act.

I. The Legislative History of the Sound Recording Amendment of 1971 Cannot Predetermine the Application of the Fair Use Provision of the Copyright Act of 1976

The doctrine of fair use was codified for the first time in section 107 of the Copyright Act of 1976, 17 U.S.C. § 107.[2] *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659, 5678 (hereinafter "1976 House Report"); S. Rep. No. 94-473, 94th Cong., 1st Sess. 61 (1975) (hereinafter "1975 Senate Report"). There is no reference to home recording in section 107 or in the House and Senate reports accompanying it, and no suggestion that Congress considered home recording to be fair use. Yet the petitioners claim that "legislative history [of the Sound Recording Amendment of 1971] shows that Congress regarded and intended home recording, audio and video, to be fair use and thus to be precisely within the exceptions or limitations specified in § 107." Petitioners'

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[2] Section 107 provides, in its entirety, as follows:

"§ 107. Limitations on exclusive rights: Fair use

"Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"(2) the nature of the copyrighted work;

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

"(4) the effect of the use upon the potential market for or value of the copyrighted work."

Brief at 33. Such a *per se* rule of fair use is without foundation under section 107.

In the first place, section 107 does not purport to define fair use, or to determine that a particular use is a fair use. Instead, it gives examples of the kinds of creative uses of a copyrighted work that are traditionally regarded as fair uses ("reproduction . . . for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research"), and lists four statutory criteria that are considered relevant in judging whether a given use is fair or infringing. The proper approach to the fair use issue under section 107 was explained by the 1976 House Report, in language identical to that contained in the 1975 Senate Report, as follows:

> "The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, *the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute.* The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, *the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.* Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." 1976 House Report, *supra*, at 66 (emphasis added); *see also* 1975 Senate Report, *supra*, at 62.

Home recording has nothing in common with the creative uses listed in section 107, and it is not even mentioned in the statutory criteria. Thus, the application of a *per se* rule that home recording is fair use would stretch section 107 beyond recognition and would flout

the specific direction of Congress to consider the four criteria contained in that section. Moreover, it would be entirely at odds with the flexible "case-by-case" approach envisaged by Congress when it enacted section 107.[3] Neither the petitioners nor the *amici* supporting them explain why the Court should disregard the plain language of section 107 in this way.

Second, the legislative history relied upon by the petitioners pertained to a 1971 law that was repealed in its entirety by the Copyright Act of 1976. For the reasons given in Section II.B., *infra*, all of the evidence indicates that the views concerning home recording expressed in the legislative history of the 1971 Amendment were not incorporated into the 1976 Act or its legislative history. There is nothing in the language or the legislative history of the current law to suggest that Congress in 1976 regarded home recording as fair use.

Moreover, the *per se* rule of fair use claimed by the petitioners is expressly contradicted by the following statement in the 1976 House Report, reflecting a similar statement in the 1975 Senate Report:

> "[T]he reference to fair use 'by reproduction in copies or phonorecords or by any other means' [in section 107] is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use; *it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use.*" 1976 House Report,

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[3] It should also be noted, as is perfectly plain from the 1976 House Report quoted above, that section 107 was intended to codify the existing *judicial* doctrine of fair use and not to recognize a purported *statutory* or *legislative* rule. *See* 1976 House Report, *supra*, at 66; 1975 Senate Report, *supra*, at 62. Since the *per se* rule claimed by the petitioners is derived from the legislative history of the 1971 Amendment, Petitioners' Brief at 33-39, and has never been judicially applied, it follows that Congress cannot have intended to codify it in section 107.

supra, at 66 (emphasis added); *see also* 1975 Senate Report, *supra*, at 62.

For all of the foregoing reasons, we concur with Professor Melville B. Nimmer, the nation's foremost copyright scholar, that "[t]he conclusion is . . . inescapable that audio home recording was not singled out by Congress for special fair use treatment under the Copyright Act of 1976." Nimmer, "The Legal Status of Home Audio Recording of Copyrighted Works" 19 (Apr. 21, 1982), *to be reprinted in Hearings on S. 1758 before the Senate Committee on the Judiciary*, 97th Cong., 2d Sess. —— (1982) (Statement of Recording Industry Association of America, Inc., Appendix 7) (hereinafter "Nimmer Memorandum"). Thus, the question of fair use now before this Court must be determined—as it was determined by the Ninth Circuit—by carefully considering whether home video recording is the kind of creative use traditionally regarded as fair use in light of the four criteria enumerated in section 107 of the current statute. The legislative history cited by the petitioners cannot predetermine this fair use issue. There is no *per se* rule that home recording constitutes fair use.[4]

II. There Is No Home Recording Exemption Under Current Law

It is not disputed by any of the parties that section 106(1) of the Copyright Act of 1976, 17 U.S.C. § 106(1), gives copyright owners the exclusive right to reproduce their copyrighted works, and that this right is not expressly limited by a home recording exemption either in the statute or its legislative history. Nonethe-

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[4] This brief does not discuss the Ninth Circuit's conclusion that home video recording does not constitute fair use under section 107. This issue is not of unique application to sound recordings, and it has been comprehensively briefed by the respondents. It is sufficient here to note that RIAA endorses the Ninth Circuit's analysis and conclusion with respect to fair use.

less, the District Court concluded that "Congress did not intend this broad statement [in section 106(1)] to include reproductions of sound recordings for home use" or "to give copyright holders of audiovisual works monopoly power over off-the-air recording of their works for home use." 480 F. Supp. at 443. Thus, the trial court found an absolute exemption where the current statute and its legislative history provide none. Not even the petitioners attempt to defend this conclusion.

To find support for a supposed home recording exemption under current law, the District Court was obliged to go back to the Sound Recording Amendment of 1971—a statute that was repealed by the 1976 Act—and draw the following inferences: first, notwithstanding the contrary language of the 1971 Amendment, Congress intended in 1971 to create a home audio recording exemption; second, notwithstanding the contrary language of the 1976 Act and its legislative history, such intention was incorporated into the current statute; and third, notwithstanding the contrary language of the 1976 Act and its legislative history, such intention is applicable to audiovisual works as well as sound recordings.

The Ninth Circuit correctly rejected the trial court's overreaching inferences:

> "When one analyzes whether there exists an implied home video recording exception, apart from the fair use doctrine, in the light of the statutory framework, it is manifest that the district court's conclusion was erroneous." 659 F.2d at 966.

The Ninth Circuit found that "[t]he statutory framework is unambiguous; the grant of exclusive rights is only limited by the statutory exceptions," 659 F.2d at 966, and it concluded that "[t]he statute itself and the House and Senate Reports accompanying the 1976 Act do not provide for a broad based home use exception," *id.* at 968. The following analysis of home audio recording reinforces the Ninth Circuit's conclusion.

A. The Sound Recording Amendment of 1971 Did Not Create a Home Audio Recording Exemption

The Sound Recording Amendment of 1971, P. L. No. 92-140, 85 Stat. 391 (1971), granted federal copyright protection to sound recordings for the first time. There was no mention of a home audio recording exemption either in the bill considered by Congress,[5] or in the Senate proceedings relating to it,[6] or in the statute as finally enacted. After approval by the Senate, the bill was referred to the House Judiciary Committee, whose report contained a passage relied upon by the District Court—as well as by the petitioners and several *amici* supporting them—as the principal evidence of legislative intent in 1971:

> "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 7 (1971), *reprinted in* [1971] U.S. Code Cong. & Ad. News 1566, 1572 (hereinafter "1971 House Report").

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[5] S. 646, 92d Cong., 1st Sess. (1971); H.R. 6927, 92d Cong., 1st Sess. (1971).

[6] *See* S. Rep. No. 92-72, 92d Cong., 1st Sess. (1971); 117 Cong. Rec. 2002 (1971); 117 Cong. Rec. 12,762-65 (1971); 117 Cong. Rec. 35,284 (1971).

Several reasons compel the conclusion that this passage did not suffice to create—and was not intended to create—a home audio recording exemption under the 1971 Amendment. *First*, the language of the 1971 Amendment was clear and unequivocal on its face,[7] so that resort to the 1971 House Report to divine a contrary intention is entirely unnecessary. *See United States v. Oregon*, 366 U.S. 643, 648, *rehearing denied*, 368 U.S. 870 (1961); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201, *rehearing denied*, 425 U.S. 986 (1976).

Second, the quoted passage was never joined in by the Senate; at most, it represented the intent of only one chamber of Congress. There is no justification, in the absence of an exemption in the Amendment itself, for inferring that the 1971 House Report reflected the intent of Congress as a whole.[8]

Third, the quoted passage did not purport to create a special exemption for sound recordings. This is clear from the first and last sentences of the quoted passage. The first sentence indicates that the new rights in sound recordings were to be no "broader" than the rights in other works under existing law. Similarly, the last sentence emphasizes that "the record producers and performers would be *in no different position* from that of the owners of copyright in recorded musical compositions over the past twenty years" (emphasis added). Since

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[7] Section 1(a) of the 1971 Amendment gave the owner of copyright in a sound recording the exclusive right "[t]o reproduce . . . reproductions of the copyrighted work if it be a sound recording." P. L. No. 92-140, § 1(a), 85 Stat. 391 (1971).

[8] Without citation of authority, the petitioners advance the novel proposition that "[s]ince the exclusive rights are a matter of joint intendment by *both* the Senate and the House, the lack of intendment by either legislative body as to any particular right is relevant." Petitioners' Brief at 36 n.41 (emphasis in the original). This argument, if allowed to prevail, would permit one chamber of Congress to rewrite a statute which may be enacted only by both chambers. No such doctrine is known to our constitutional law.

there existed in 1971 no special exemption for musical works, it follows that the House Judiciary Committee cannot have intended to create a special exemption for sound recordings. Such an exemption would have placed sound recordings in an entirely different position from musical works—precisely what the Committee said it did not intend to do.[9]

The District Court cited a number of additional sources which it claimed were relevant to legislative intent in 1971, including hearing testimony before Subcommittee No. 3 of the House Judiciary Committee, and a 1961 report of the Register of Copyrights. 480 F. Supp. at 445-46. As the Ninth Circuit forcefully observed, the quoted statements "hardly represent—when considered in the context in which they were made and in the context of

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[9] The District Court also quoted the following colloquy on the floor of the House as further evidence that the "home recording" passage in the 1971 House Report was intended to create a special exemption for sound recordings, 480 F. Supp. at 446:

> "Mr. KAZEN: Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?
>
> "Mr. KASTENMEIER: Yes.
>
> "Mr. KAZEN: In other words, if your child were to record off of a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill.
>
> "Mr. KASTENMEIER: This is not included in the bill. I am glad the gentleman raises the point.
>
> "On page 7 of the [1971 House] report under 'Home Recordings,' Members will note that under the bill the same practice which prevails today is called for; namely, *this is considered both presently and under the proposed law to be fair use.* The child does not do this for commercial purposes. This is made clear in the report." 117 Cong. Rec. 34,748-49 (1971) (emphasis added).

Far from evidencing any intent to create a special exemption for sound recordings, the quoted colloquy suggests only that what was

the 20-year copyright revision process—a firm expression of Congressional intent to carve out a major exception to the copyright scheme." 659 F.2d at 968.

Thus, the District Court quoted the following exchange between Representative Biester and the then Assistant Register of Copyrights Barbara Ringer during hearings on the 1971 Amendment before Subcommittee No. 3 of the House Judiciary Committee:

> "Mr. BIESTER: I do not know that I can add very much to the questions which you have been asked so far.
>
> "I can tell you I must have a small pirate in my own home.
>
> "My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set.
>
> "Now, he may retrieve in addition something else onto his recording, but nonetheless, he does retrieve the basic sound, and this legislation, of course, would not point to his activities, would it?

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considered fair use under the Copyright Act of 1909, P.L. No. 349, 35 Stat. 1075 (1909), should likewise be considered fair use under the 1971 Amendment. This expression of opinion does not amount to an absolute home recording exemption, and it cannot predetermine the fair use issue now before the Court, as the petitioners erroneously contend. Petitioners' Brief at 37, 39. Even if the Congressman believed in 1971 that home recording of copyrighted works constituted fair use under the 1909 Act, it is well settled, and this Court has often held, that the opinion of one Congress as to the interpretation of a statute passed by a previous Congress has "very little, if any, significance." *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958). *See also United States* v. *United Mine Workers of America*, 330 U.S. 258, 282 (1947); *United States* v. *Price*, 361 U.S. 304, 313 (1960). The colloquy has even less significance where, as here, the quoted statement was never joined in by the Senate, and where there is no reason to infer that it reflected the view of Congress as a whole. In any event, the 1971 Amendment was repealed in its entirety by the Copyright Act of 1976, and it is the 1976 Act—not the legislative history of the 1971 Amendment—that governs the fair use issue in this case.

> "Miss RINGER: I think the answer is clearly, 'No, it would not.'
>
> "I have spoken at a couple of seminars on videocassettes lately, and this question is usually asked: 'What about the home recorders?'
>
> "The answer I have given and will give again is that this is something you cannot control.
>
> "You simply cannot control it." *Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6927 before Subcommittee No. 3 of the House Judiciary Committee*, 92d Cong., 1st Sess. 22 (June 9 and 10, 1971) (hereinafter "1971 Hearings").

This exchange did not disclose any legislative intent to create a home audio recording exemption. Ms. Ringer noted the difficulty of enforcement ("you simply cannot control it"), but she did not state that this difficulty justified an exemption from liability. She also emphasized that the pending legislation was not addressed to (did not "point to") noncommercial taping activities. In fact, as is made clear elsewhere in the 1971 House and Senate reports, the 1971 Amendment was a short-term, stop-gap measure designed to deal with the "immediate and urgent" problem of commercial record piracy. *See* 1971 House Report, *supra*, at 4; *see also* S. Rep. No. 92-72, 92d Cong., 1st Sess. 3-4 (1971).

Ms. Ringer went on to give her own view of home recording in prescient language which was not quoted by the District Court:

> "My own opinion, whether this is philosophical dogma or not, is that sooner or later there is going to be a crunch here. But that is not what this legislation is addressed to, and I do not see the crunch coming in the immediate future.
>
> "Other countries have felt it more directly than we, partly because record prices are lower here than, say, in Germany. In that situation there is a range

> of legal devices for trying to keep the practice under reasonable control. But I do not see anybody going into anyone's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping." 1971 Hearings, *supra*, at 22-23.

Thus, Ms. Ringer foresaw the home taping "crunch" that is now before this Court. However, she did not lend her support to an exemption from liability; indeed, she would scarcely have foreseen a home taping "crunch" in the future if she had thought that Congress meant to exempt home taping from liability in 1971.

The District Court quoted one more exchange between Representative Biester and Ms. Ringer on the home taping issue:

> "Mr. BIESTER: [W]ith respect to videocassettes, are we approaching an additional problem, not with respect to private use, but with respect to public distribution after it has been retrieved over a home set?
>
> "Ms. RINGER: The answer is very definitely, 'yes.'
>
> "For years the motion picture industry has been faced with bootleg problems, much of it derived from the 16 mm. prints that were distributed to the Armed Forces and got out of control. The film industry has had a very active policing activity for years.
>
> "I think that this problem is going to undergo a quantum increase when videocassette recorders are freely available. But I would say that there is a big difference, and I think it is something that you might consider. *In that area, they have got copyright protection, and in this area, who knows? It is certainly not protectable under the Federal statute.*" 1971 Hearings, *supra*, at 23 (emphasis added).

The District Court and two *amici* supporting the petitioners erroneously construed the language in italics to

mean that home audio recording was not subject to copyright infringement liability under the 1971 Amendment. In fact, as Professor Nimmer has pointed out, Ms. Ringer was speaking prior to enactment of the bill, and it is obvious that she was merely contrasting the legal status of videocassettes (which *were* protectable under the federal copyright statute then in effect) and sound recordings (which were *not* of course protectable under federal law until passage of the 1971 Amendment). *See* Nimmer Memorandum, *supra*, at 11.

The District Court and the petitioners also referred to the following statement from a 1961 Report of the Register of Copyrights as evidence of legislative intent:

> "New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright." *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Judiciary Committee Print*, 87th Cong., 1st Sess. 30 (1961).

Any reliance on this quotation as evidence of legislative intent with respect to home recording is entirely misplaced. As is made clear by the preceding paragraph of the Report,[10] the statement was made in response to an

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[10] The preceding paragraph of the Register's 1961 Report, not quoted by the District Court, is as follows:

> "Motion picture producers and distributors have urged that *the performance right* in motion pictures should extend to what are clearly private performances, including performances given in private homes. They point to *Patterson* v. *Century Productions*, and its concept that exhibition is a form of copying, to support their position. Motion picture films are commonly leased for exhibition at specified places and dates. Most leases are for commercial exhibitions, but many films are also leased for home use. It is argued that in either case private exhibitions beyond the terms of the lease should constitute an infringement of copyright." *Id.* at 29 (emphasis added).

argument that private *performances* of motion pictures should under certain circumstances constitute an infringement of copyright. It was not directed to the issue of private *recording*. The Register's recommendation that private performances should not be considered infringing was in fact adopted in section 106(4) of the current law, which gives the copyright owner control only over *public* performances. There is no such limitation in section 106(1) on the right of reproduction.

Finally, the petitioners and several *amici* supporting them make much of the following statement of Mr. Stanley M. Gortikov, then the President of Capitol Records, as further evidence of legislative intent in 1971, Petitioners' Brief at 36 n.40:

> "[T]he pirate also argues that granting a copyright may raise questions about the individual who in his home may duplicate a commercial performance on home-recording equipment. We in the industry certainly have known that such amateur practices go on in the home, and we realistically recognize that no such enforcement is possible, and certainly none is intended." 1971 Hearings, *supra*, at 26.

Mr. Gortikov's statement did not credit the existence of a home recording exemption. On the contrary, his statement, like Ms. Ringer's exchange with Representative Biester, was directed only to the difficulty of enforcement, not to the scope of liability. In any event, it can scarcely be contended that Mr. Gortikov's view of the 1971 Amendment amounted to a binding expression of legislative intent.

None of the statements quoted above justifies the inference that Congress intended to create a home audio recording exemption under the 1971 Amendment. As the Ninth Circuit correctly noted, even the statements of Representative Kastenmeier and Ms. Ringer "do not clearly establish an intent to exempt unauthorized reproductions *apart from the fair use doctrine*." 659 F.2d at

968 n.8 (emphasis in the original). Not even the petitioners—and not one of the *amici* supporting them—claim that the miscellany of legislative materials cited by the District Court amounts to an absolute home recording exemption.

B. There Is No Home Audio Recording Exemption Under the Copyright Act of 1976

Even assuming *arguendo* that Congress intended to create a home audio recording exemption when it enacted the Sound Recording Amendment of 1971, there is no evidence to support the District Court's conclusion that an exemption was somehow incorporated *sub silentio* into the Copyright Act of 1976. Indeed, all the evidence—including the language, structure and legislative history of the 1976 Act, as well as basic principles of statutory interpretation—point to the opposite conclusion.

In the first place, the language of the 1976 Act is clear and unambiguous. The copyright owner's exclusive right to reproduce is set forth in broad terms in section 106(1),[11] subject only to the specific limitations contained in sections 107 through 118. There is no home recording exemption in any of those sections. Thus, to infer an implied home audio recording exemption in addition to the express limitations contained in sections 107 through 118 is to ignore what the Ninth Circuit justly called "elementary principles of statutory construction." 659 F.2d at 966.[12] The creation of express

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[11] Section 106(1) provides, in pertinent part, that "the owner of copyright under this title has the exclusive rights . . . to reproduce the copyrighted work in copies or phonorecords." 17 U.S.C. § 106(1). The 1976 House Report makes it clear that Section 106(1) is infringed when "the actual sounds that go to make up a sound recording are reproduced in phonorecords by . . . recapturing off the air . . . ." 1976 House Report, *supra*, at 106.

[12] The applicable rule of statutory construction was recently reaffirmed by this Court in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 188 (1978), where it was held that:

limitations in sections 107 through 118 of the 1976 Act must be presumed to negate the existence of any implied exemption.[13]

The structure of the 1976 Act also refutes the District Court's inference of an implied home audio recording exemption. As the current Register of Copyrights has observed, the statute was deliberately constructed to anticipate new technological uses such as home taping:

> "Congress chose not to provide a blanket exemption for home videotaping. . . .
>
> "The basic philosophy of the 1976 Copyright Act was influenced by the perceived tendency of prior copyright laws to become outdated upon the development of new technological means for exploiting works of authorship. . . .
>
> "The design for achieving a statute capable of taking into account future innovations was the very architecture of the statute. In that design, section 106 sets forth in broad terms the copyright owner's exclusive rights of reproduction, adaptation, publication, performance, and display. Following this broad provision are specific provisions establishing various limitations, qualifications or exemptions. Thus, under the theory of the 1976 Act, *unless a use of a work is specifically exempted from copyright liability, its use falls within the exclusive rights of the*

"In passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus, [the statute in certain cited sections] creates a number of limited 'hardship exemptions,' none of which would even remotely apply to the [present case] . . . . Under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only 'hardship cases' Congress intended to exempt."

[13] The petitioners, in an apparent attempt to circumvent the applicable rule of construction, argue that home recording is fair use, and is therefore included in section 107. Petitioners' Brief at 33. This misconceived argument has been discussed in Section I, *supra*.

> *copyright owner.*" Statement of David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services, 17-19 (Apr. 21, 1982) *to be reprinted in Hearings on S. 1758 Before the Senate Committee on the Judiciary*, 97th Cong., 2d Sess. —— (1982) (Statement of David Ladd) (emphasis added).

The Ninth Circuit properly called attention to this "unambiguous" statutory framework, and rightly admonished the trial court that "we should not, absent a clear direction from Congress, disrupt this framework by carving out exceptions to the broad grant of rights apart from those in the statute itself." 659 F.2d at 966. Thus, the inference of an implied home audio recording exemption violates not only the language of the statute but also its very architecture, and thereby turns congressional intent on its head.

Moreover, the legislative history of the 1976 Act—even if it were considered relevant—contains absolutely no reference to a home audio recording exemption. With three separate opportunities to express a view on home recording—the 1975 Senate Report, *supra*, the 1976 House Report, *supra*, and a 1976 Conference Report, H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. (1976)—the responsible committees of Congress said nothing on the subject to contradict the plain meaning of the current statute.[14] The District Court acknowledged this omis-

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[14] The petitioners argue that the 1971 House Report was an "integral part" of the legislative history of the 1976 Act, citing letters from the Librarian of Congress to the House and Senate Judiciary Committees in 1971, and a portion of the 1971 House Report. Petitioners' Brief at 37-38. The Brief of *amici* McCann-Erickson, Inc. *et al.*, at 11, also cites a portion of the 1971 Hearings for the same proposition. In fact, what these sources all refer to is the contemplated merger of the *statutory provisions* of the 1971 Amendment into the general revision bill. They do not answer the question at issue here, namely, whether the *legislative history* of the 1971 Amendment—including the references to home recording—were incorporated *sub silentio* into the legislative history of the current

sion, but interpreted it as evidence of an *unaltered* legislative intent to exempt home audio recording from infringement liability under the 1976 Act. 480 F. Supp. at 444-45. Even assuming such intent under the prior law, the trial court's reasoning ignores the settled rule, reiterated by the Ninth Circuit, that "silence cannot be viewed as an expression of legislative intent." 659 F.2d at 968, *citing Turpin* v. *Mailet*, 579 F.2d 152 (2d Cir.), *vacated*, 439 U.S. 974 (1978), *on remand*, 591 F.2d 426 (2d Cir. 1979). *Accord, Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4, 11 (1942); *Girouard* v. *United States*, 328 U.S. 61, 69 (1946). Furthermore, it overlooks three telling facts, also noted by the Ninth Circuit, which clearly manifest an *altered* intention under the 1976 Act. 659 F.2d at 967 n.5, *quoting* 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[F][5] n.159 (1981).

First, certain portions from the 1971 House Report were incorporated *verbatim* in the 1976 House Report,[15] while the passage on home recording was omitted in its entirety. Thus, the omission cannot be attributed to an assumption by the House Judiciary Committee that it was unnecessary to restate its legislative intent in 1976. Neither the District Court nor the petitioners explain why the House Committee saw fit to omit the passage that forms the cornerstone of their argument with respect to legislative intent.[16]

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law. Similarly, Copyright Office Circular R-99, also cited by the petitioners, Petitioners' Brief at 38 n.45, states only that "[t]he new law retains the provisions added [by the 1971 Amendment];" it does not refer to the legislative history.

[15] *Compare, e.g.*, H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 5 (1971) (bottom paragraph), *reprinted in* [1971] U.S. Code Cong. & Ad. News 1566, 1570 *with* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 56 (1976) (second full paragraph), *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659, 5669.

[16] The best explanation the petitioners can offer is that the 1975-1976 reports did not mention home recording because that subject had already been "settled" in 1971. Petitioners' Brief at 38. What

Second, the 1971 Amendment and its legislative history applied only to sound recordings, and did not (indeed could not) affect the scope of rights in musical or other works embodied in such recordings.[17] Thus, when Congress legislated in 1976 with respect to all copyrighted works, it could not have incorporated an intent to exempt home recording of musical works without expressly referring to them.

Third, there is language in the 1976 legislative history that is totally incompatible with any implied home audio recording exemption. For example, the 1976 House Report, *supra*, at 66, echoing similar language in the 1975 Senate Report, warned that "it is not intended to give [photocopying and taping] any special status under the fair use provision." *See also* 1975 Senate Report, *supra*, at 62. Moreover, the 1975 Senate Report, discussing off-the-air recording of instructional television transmissions by a school for purposes of delayed viewing by its students—an educational activity more obviously favored by the fair use doctrine—stated that:

> "The committee does not intend to suggest however, that off-the-air recording for convenience would under any circumstances, be considered 'fair use.'" 1975 Senate Report, *supra*, at 66.

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this "explanation" fails to explain is why the 1976 House Report did restate other portions of the 1971 House Report concerning subjects which might also be considered to have been "settled" in 1971. *See* n.15, *supra*.

[17] It should be noted that recorded music may, and usually does, include at least two copyrights: a copyright in the sound recording and a copyright in the underlying musical work. *See generally* Diamond, "Sound Recordings and Phonorecords: History and Current Law" U. Ill. L.F. 337, 339-45 (1979). For a comprehensive discussion of home recording of musical works, *see* Baumgarten, "Private Audio Recording of Copyrighted Music" (Apr. 21, 1982), *to be reprinted in Hearings on S. 1758 Before the Senate Committee on the Judiciary*, 97th Cong., 2d Sess. —— (1982) (Statement of Jon A. Baumgarten).

Thus, the language, structure and legislative history of the current statute all confirm that Congress did not intend to exclude home audio recording from the scope of the copyright owner's exclusive right of reproduction under section 106(1) of the 1976 Act. We concur with Professor Nimmer's view that "[e]ven if . . . it be assumed that an audio home recording exemption were somehow contained in the 1971 Amendment, it must be concluded that any such exemption was not carried over into the general revision of copyright law as embodied in the Copyright Act of 1976." Nimmer Memorandum, *supra*, at 12.[18]

C. It Follows that There Is No Exemption for Home Video Recording Under Current Law

The District Court concluded that home video recording is exempt from copyright infringement liability by analogy with home audio recording; it did not suggest any independent basis for a home video recording exemption under current law. 480 F. Supp. at 446. Since there is no exemption for home audio recording under current law, it follows that no such exemption is applicable—by analogy or otherwise—to home video recording. The Ninth Circuit so held, 659 F.2d at 969, and its conclusion is unassailable. Nor is it necessary to distinguish audiovisual works from sound recordings in arriving at this conclusion.[19] As the preceding analysis demonstrates,

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[18] This conclusion coincides with the view previously expressed by Professor Nimmer in his treatise. *See* 2 M. Nimmer, *Nimmer on Copyright* § 8.05[C] (1981).

[19] Only one of the *amicus* briefs in support of the petitioners asserts that the trial court's home audio recording exemption was "acknowledged" by the Ninth Circuit. Brief of *amici* General Electric Company, *et al.*, at 9. On the contrary, while the Ninth Circuit was careful to distinguish sound recordings from audiovisual works, and expressly limited its holding to the latter, 659 F.2d at 966-69, its interpretation of the "unambiguous" statutory framework of the 1976 Act is fully applicable to home recording of sound recordings.

both home audio recording and home video recording are fully subject to copyright infringement liability under current law in the absence of a valid defense. There is no home recording exemption of any kind under the Copyright Act of 1976.

CONCLUSION

For the foregoing reasons, the Court should reject the petitioners' contention that the legislative history of the Sound Recording Amendment of 1971 predetermines the fair use issue. Furthermore, the Court should affirm that portion of the Ninth Circuit's opinion holding that there is no home video recording exemption under current law.

Respectfully submitted,

JAMES F. FITZPATRICK *
CARY H. SHERMAN
HAMISH R. SANDISON
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700
Attorneys for Amicus Curiae
Recording Industry Association of America, Inc.

* *Counsel of Record*

Of Counsel:
ERNEST S. MEYERS
MEYERS, TERSIGNI, KAUFMAN, DEBROT, FELDMAN & GRAY
630 Third Ave.
New York, N.Y. 10017
(212) 953-9000

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Amicus Brief

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Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF OF AMICUS CURIAE SANYO ELECTRIC, INC.

LILLICK MCHOSE & CHARLES,
ANTHONY LIEBIG,
707 Wilshire Blvd., 45th Floor,
Los Angeles, Calif. 90017,
(213) 620-9000,
Attorneys for Amicus Curiae
Sanyo Electric, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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No. 81-1687

IN THE

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

BRIEF OF AMICUS CURIAE SANYO ELECTRIC, INC.

I.
INTEREST OF AMICUS.

Sanyo Electric, Inc., is a Delaware corporation which distributes video tape recorders (VTRs). It is interested in this matter because the outcome will affect its business and because it is one of the fifty defendants in respondent Universal City Studios' second copyright infringement action[1] which has been stayed pending decision in this case. Similar cases may be filed at any moment against these fifty defendants and others by literally hundreds of potential plaintiffs. What happens in this case will affect all those cases, a major industry, and, most important, the American public.

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[1] *Universal City Studios, Inc. v. RCA Corporation*, U.S.D.C., C.D. Calif. No. CV 81-5723 FW.

II.
ARGUMENT.

PUBLIC DOMAIN PRINCIPLES AND THE FIRST AMENDMENT REQUIRE REVERSAL OF THE COURT OF APPEALS' DECISION.

A. Introduction.

In its parochial approach to a momentous issue the Court of Appeals established a wrong precedent by failing to consider an important national policy and the First Amendment rights of millions of VTR owners.

The Court of Appeals concluded there was infringement after balancing only the rights of the parties. *What was required was an informed three-way balancing of respondents' rights under the Copyright Act, national policy, and the citizenry's rights under the First Amendment.*

Such a balancing requires an in depth consideration of basic principles and compels a holding that delayed viewing, or time-shifting, does not constitute copyright infringement, which in turn compels a holding that VTRs are staple items of commerce and that making them available to the public does not constitute contributory copyright infringement.[2]

B. Petitioner May Assert, and the Court Should Consider, the Rights of VTR Owners.

If this case involved a VTR owner's appeal from a copyright infringement judgment, it would be in clearer focus. Petitioner may assert VTR owners' rights, however, "because, though a corporation, it is directly engaged in

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[2]By focusing on delayed viewing, or time shifting, we do not mean to infer or concede that "librarying" for personal use is not a protected activity. It should also be held to be protected. The status of "librarying," however, is a more complex question which does not have to be addressed here.

those activities, claimed to be constitutionally protected, which the statute would curtail.''[3]

As developed more fully below, the VTR owners have First Amendment reception rights and public domain access rights and they are the intended beneficiaries of federal laws regulating the airwaves.

In addition, they have privacy rights which implicate the First Amendment:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[4]

While the remedies sought below may not, strictly speaking, constitute prior restraint, they would cut off *potential VTR owners* from an important medium of communication. These people would be precluded from delayed viewing of news and important programming as well as respondents' soap operas.[5] Thus there is some inference, if not a ''heavy

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[3]*N.A.A.C.P. v. Button*, 371 U.S. 415, 428 (1963).

[4]*Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

[5]The soap operas do give rise to First Amendment rights. As this Court said in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952), which held that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters v. New York*, 333 U.S. 507, 510 (1948):
>
> 'The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.'

presumption," these remedies would be unconstitutional.[6]

C. Public Domain and First Amendment Rights Are Implicated.

> "*[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.*"[7]
>
> "*The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.*"[8]

VTR owners are the beneficiaries of the over-arching national policy of preserving access to that priceless accumulation of human knowledge and experience known as the public commons, public domain, or *publici juris*.

Under the Constitution (Art. I, §8, Cl. 8) copyright and patent *are drastically limited exceptions to the public domain, and there are no others*. To even obtain these limited monopolies for that which is original and novel the creator must *dedicate* his entire creation to the public domain.[9] In this context, "fair use," which has been discussed so much

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[6]*See, e.g. Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697 (1931).

[7]*First National Bank of Boston v. Belloti*, 435 U.S. 765, 783 (1978).

[8]*United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

[9]*Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249 (1945); *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938); *International News Service v. Associated Press*, 248 U.S. 215 (1918); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896).

in this proceeding, is perhaps best understood as the consequence of a partial dedication of "expression" at the time of "publication."[10]

The public domain has been universally taken for granted. As it has rarely been invaded, it is hardly charted. In this age of entertainment, copyright proprietors and attorneys look upon it as a graveyard or a place to stake a novel claim, while it should be seen as an asset of the citizenry more precious than the navigable streams, scenic wonders, redwoods, etc.[11] Technology enables new assaults, and it is

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[10]"Does this doctrine ['fair use']—a floating one, not mentioned in the statute—bring into our inquiry anything new or special? We are told that the earliest American report in which the expression appeared—within quotation marks—was that of *Lawrence v. Dana* [15 Fed. Cas. 26, 60 (No. 8136) (C.C.D. Mass. 1869). On early usages of fair use or cognate expressions, see Cohen, 'Fair Use in the Law of Copyright', in 6 ASCAP, COPYRIGHT LAW SYMPOSIUM 43, 48-49 (1955)] in 1869, where the defendant's edition of Wharton's 'Elements of International Law' was accused as a plagiarism of the plaintiff's earlier edition of the same work. Justice Clifford's opinion, sustaining the charge, followed Story on the factors to be considered in adjudging liability for the research uses of one scholarly book by another; [Justice Clifford relied particularly on *Folsom v. Marsh*, 9 Fed. Cas. 343, 348 (No. 4901) (C.C.D. Mass. 1841)], fair use emerged as the sort of taking which on such consideration would be held noninfringing. Justice Clifford was not being consciously innovative. Judge Hand in the *Nichols* and *Sheldon* cases seemed also to speak of fair use as merely the contrary of infringement. [*Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936)]. But other authorities have taken fair use to refer to a set of justifications averting liability for what on the face of things is infringement. [Nimmer, Copyright §145, at 654 (1965). *See generally* Cohen, *supra* note 89, at 45-48.] This tends to leave the impression that infringement itself is decided without contamination by notions of policy, with fair use coming in later to supply those notions. But policy runs throughout our subject, as much of the discourse to this point shows. . . ." B. Kaplan, AN UNHURRIED VIEW OF COPYRIGHT 67 (1967).

[11]See Krasilovsky, "Observations on Public Domain," 14 Bulletin Copyright Society of the U.S.A. 205 (1967).

perhaps unfortunate the public domain does not now have standing to sue for its own preservation.[12]

Public domain information must either be memorialized or stored in some manner or lost, and libraries of received and stored information serve as both extensions of human memory and access to the public domain. Copyright, which evolved from English censorship in the Sixteenth Century,[13] like censorship itself, may impede the growth of, and access to, the public domain.[14]

Seen in this light the carefully worded Copyright Clause and the First Amendment are bulwarks of the public domain. When the Constitution and the Bill of Rights were written, copyright was still in its embryonic stage.[15] But clearly principal beneficiaries of free speech were intended to be the listeners, transcribers, and readers, as well as the speakers, for "the broad principles and . . . shared values and practices" with which the framers were concerned[16] included the healthy appreciation of public domain values enunciated by Lord Mansfield in the 1785 case of *Sayre v. Moore*:

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[12]*Cf. Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J. dissenting).

[13]*See* Kaplan, *supra* note 10, at 2-6.

[14]The potential tension between copyright and the First Amendment has not gone entirely unnoticed. *See, e.g.*, Nimmer "Does Copyright Abridge the First Amendment Guaranties of Free Speech and Press?" 17 U.C.L.A.L. Rev. 1180 (1970); Goldstein, "Copyright and the First Amendment," 70 Colum. L. Rev. 983 (1970). *Cf. Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert denied*, 385 U.S. 1009 (1967); *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130 (S.D.N.Y. 1968); and *Meeropol v. Nizer*, 361 F.Supp. 1063 (S.D.N.Y. 1973).

[15]*Donaldson v. Becket*, 4 Burr. 2408 (1774); *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1796).

[16]*Globe Newspaper Company v. Superior Court for the County of Norfolk*, 50 U.S.L.W. 4759, 4761 (U.S. June 23, 1982), *reversing* Mass. Adv. Sh. 969, 423 N.E.2d 773 (1981).

The rule of decision in this case is a matter of great consequence to the country. In deciding it we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community may not be deprived of their just merits, and the reward of the ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.[17]

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[17] 1 East 361 n., 102 Eng. Rep. 139 n. (K.B. 1785). Lord Mansfield's full statement was:

> The rule of decision in this case is a matter of great consequence to the country. In deciding it we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copyright to authors guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject. As in the case of histories and dictionaries: In the first, a man may give a relation of the same facts, and, in the same order of time; in the latter an interpretation is given of the identical same words. In all these cases the question of fact to come before a jury is, Whether the alteration be colourable or not? there must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So in the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with regard to charts; whoever has it in his intention to publish a chart may take advantage of all prior publications. There is no monopoly of the subject here, any more than in the other instances; but upon any question of this nature the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected even in a small degree, if it thereby become more serviceable and useful for the purposes to which it is applied. But here you are told, that there are various and very material alterations. This chart of the plaintiffs' is upon a wrong principle, inapplicable to navigation. The defendant therefore has been correcting errors, and not servilely copying. If you think so, you will find for the defendant; if you think it is a servile imitation, and pirated from the other, you will find for plaintiffs.

This relationship was expressly recognized by this Court in *Curtis Publishing Co. v. Butts* when it stated: "'[T]he Founders . . . felt that a free press would advance 'truth, science, morality, and arts in general' . . . .'"[18]

While the public domain in the electronic age is still largely *terra incognita*, Congress has recognized its importance and confirmed it in the Copyright Act and the Communications Act of 1934. Section 102(b) of the Copyright Revision Act of 1976 [17 U.S.C. 102(b)] provides:

> In no case does copyrighted protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

The purpose of federal regulation of the limited channels of radio communication has always been to preserve their public domain character, encourage a rapid, efficient national communications service and to encourage use in the public interest. As this Court stated in *Red Lion* and *Columbia Broadcasting System v. Democratic National Committee*:

> [i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[19]

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[18] *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967). (Opinion of Harlan, J.).

[19] *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 102 (1973).

In addition to information, the public domain necessarily includes *rights to do* various things such as to read, view or otherwise perceive, to reproduce formerly copyrighted works, to utilize all ideas, facts, sounds and colors wherever found, to read a copyrighted story to a child, to sing a copyrighted song in the shower.[20] This Court has made it clear that First Amendment rights include the right to *receive*,[21] as well as express, and that First Amendment rights may be exercised by *conduct*.[22]

D. The Protected Status of Delayed Viewing.

> "*We cannot recognize copyright as a game of chess in which the public can be checkmated.*"[23]

Before any attempt, judicial or legislative, to regulate a device or means of communication, its *function, use*, and *consequences* must be analyzed and understood lest that regulation infringe First Amendment rights.

"Sensitive tools" are required.[24] This includes analysis of new phenomena. Marshall McLuhan wrote in his germinal work, *Understanding Media: The Extensions of Man*:

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[20]*Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975).

[21]These rights of access include: the right to receive important information, *First Nat. Bank of Boston v. Belloti*, 435 U.S. 765 (1978); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976); "the right of suitable access to social, political, aesthetic, moral and other ideas and experiences," *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); the right to "receive information and ideas," *Kleindienst v. Mandel*, 408 U.S. 753, 760, 762-65 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); the right to receive printed matter, *Lamont v. Postmaster General*, 381 U.S. 301 (1965); the right of access to certain religious publications, *Cruz v. Beto*, 405 U.S. 319 (1972); the right of access to the courts, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); the right of addressees of letters to read the letters without censorship, *Procunier v. Martinez*, 416 U.S. 396 (1974).

[22]*See e.g., Spence v. Washington*, 418 U.S. 405 (1974).

[23]*Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675, 679 (1st Cir. 1967).

[24]*Speiser v. Randall*, 357 U.S. 513, 525 (1958).

> In a culture like ours, long accustomed to splitting and dividing all things as a means of control, it is sometimes a bit of a shock to be reminded that, in operational and practical fact, the medium is the message. This is merely to say that the personal and social consequences of any medium—that is, of any extension of ourselves—result from the new scale that is introduced into our affairs by each extension of ourselves, or by any new technology.[25]

The Court of Appeals clearly did not reach for the required sensitive tools. It was unaware of "the technological environment of copyright."[26] To quote McLuhan again:

> So extraordinary is this unawareness that *it* is what needs to be explained. The transforming power of media is easy to explain, but the ignoring of this power is not at all easy to explain. It goes without saying that the universal ignoring of the psychic action of technology bespeaks some inherent function, some essential numbing of consciousness such as occurs under stress and shock conditions.[27]

The Court of Appeals approached this case like a journeyman plumber. It based its decision on what goes on *inside* a VTR rather than considering delayed viewing, or time shifting, as an *activity*. It thought about "home recording" when the home recorded "copy" consisted of some magnetized particles on a coated plastic tape inside a black box and labelled the person "infringer" who merely viewed when he chose instead of when the broadcaster broadcast. *It should have considered what was happening*!

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[25]M. McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1963).

[26]Kaplan, *supra* note 10, at 119.

[27]McLuhan, *supra* note 25, at 304.

The VTR is not just a shiny gadget or "convenience". It is a significant advance in human communication. It improves that communication by serving as an extension of the recipient mind like a hearing aid or stereo system, microscope, contact lens or optic tennis ball.

By enabling delayed viewing the VTR enhances reception of communications which the government has permitted in the public interest. It promotes national and First Amendment values because it enables a person to perceive and understand what he might otherwise miss and to remember what he might otherwise forget.

When one compares the television reception/perception/retention experience with owning and reading a book or magazine, it becomes clear that the VTR is a socially valuable medium because it liberates viewers from the three tyrannies inherent in the broadcasting medium: The tyranny of scheduled evanescence, which requires a person to be in front of his television set at the appointed time or miss the transmission; the tyranny of prime-time and counter-programming, which results in the more popular programs being broadcast simultaneously during a particular part of the day; and the tyranny of imperfect memory.[28]

Delayed viewing must therefore be held to be a *protected*, rather then copyright infringing, activity. The right to delay-view should be held to be "implicit in the guarantees of the First Amendment."[29]

By the same token, respondents should be seen as no better than attempted trespassers on the public domain, or like the book publisher who demands tribute when the book owner re-reads or lends, or the sculptor who has sold his

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[28]See Note 2.

[29]*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

statue to the city and still tries to charge tourists when they photograph it in the public square.

CONCLUSION.

> *"The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world."*[30]

The "sensitive tools" are now required. Recent and continuing technological developments have made possible new assaults on public domain and First Amendment rights which must be more fully understood and recognized before they are gobbled up by the greedy.

DATED: August 28, 1982

Respectfully submitted,

LILLICK MCHOSE & CHARLES,
ANTHONY LIEBIG,
By ANTHONY LIEBIG,
Attorneys for Amicus Curiae
Sanyo Electric, Inc.

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[30]Burger, C.J., dissenting in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 50 U.S.L.W. 4831, 4840 (U.S. June 25, 1982), *affirming* 638 F.2d 404 (2d Cir. 1980).

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No. 81-1687

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OCTOBER TERM, 1982

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UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR SEARS, ROEBUCK AND CO. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MAX L. GILLAM*
LATHAM & WATKINS
555 South Flower Street
Los Angeles, California 90071
(213) 485-1234

MICHAEL CHERTOFF
LATHAM, WATKINS & HILLS
1333 New Hampshire Avenue N.W.
Suite 1200
Washington, D.C. 20036
(202) 828-4400
Counsel for Sears, Roebuck and Co. as Amicus Curiae
**Counsel of Record*

MARY E. WOYTEK
Sears Tower
Chicago, Illinois 60684
(312) 875-9240
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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BRIEF FOR SEARS, ROEBUCK AND CO. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

Pursuant to Rule 36 of this Court, Sears, Roebuck and Co. ("Sears") files this Brief as *Amicus Curiae*, supporting Petitioners' position that the decision of the United States Court of Appeals for the Ninth Circuit be reversed. The parties to this action have consented to the filing of briefs *amicus curiae*. Such consent was filed with this Court on June 30, 1982.

INTEREST OF AMICUS CURIAE

Sears is the seller of Betavision videotape recorders ("VTR") and of cassettes designed for use with VTRs.

The opinion of the Court of Appeals, if permitted to stand, may be argued to have a conclusive effect on the rights and liabilities of all VTR sellers, including Sears, and may be used in an attempt to enjoin Sears own sales of VTRs. Indeed, in the wake of the Court of Appeals' decision below, one of the respondents herein filed a suit parallel to this case against Sears and other VTR manufacturers and distributors seeking among other things an injunction against the future advertising and sale of VTRs and an accounting against Sears for its "profits" from past sales. *Universal City Studios* v. *RCA*, Dkt. No. CV81-5723 FW (C.D. Cal., filed November 6, 1981).

Accordingly, Sears submits that it will be directly and immediately affected by this Court's decision in the instant case.

SUMMARY OF ARGUMENT[1]

If the manufacture or sale of a videotape recorder (VTR) is held to be contributory copyright infringement, copyright owners will gain the power to block the sale or increase the cost to consumers of products embodying new communications technology. Such a radical expansion of the scope of copyright protection would be unprecedented, and would conflict with legal principles fashioned by this Court and Congress in the area of intellectual property law.

To outlaw the sale of VTRs would also create a conflict between the rights of different groups of copyright owners. Although one copyright owner may not wish to have

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[1] Although *Amicus*' brief addresses only the question of contributory copyright infringement (question number three of the questions presented), *Amicus* supports the positions taken by Petitioners regarding the other questions presented in this case.

his work copied free on VTRs, other copyright holders may want their works copied since "time shifting" (automatic recording for later viewing) increases the number of viewers. See P. 10, *infra*. If one copyright owner is allowed to foreclose a technological breakthrough, the rights of other copyright owners to communicate their work to a wider audience through recording will be injured. Ultimately, the public's interest in increasing access to communication and information will suffer.

ARGUMENT

I. THE MANUFACTURE OR SALE OF A VIDEOTAPE RECORDER IS NOT COPYRIGHT INFRINGEMENT UNDER LEGAL PRINCIPLES ESTABLISHED BY THIS COURT AND CONGRESS IN THE AREA OF INTELLECTUAL PROPERTY LAW

The Court of Appeals for the Ninth Circuit has held a manufacturer and distributors of videotape recorders (VTRs) guilty of contributory copyright infringement on the ground that VTR equipment is sometimes used to record copyrighted television programs without the consent of the copyright owner.[2] *Universal City Studios* v.

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[2] The Court of Appeals determined that to establish liability for contributory infringement it is enough to show (1) that the manufacturer or seller of VTRs knew that they would be used to record copyrighted programs without consent, and (2) that the sale of recorders "materially contribut[ed]" to unauthorized recording. *Universal City Studios* v. *Sony Corp.*, 659 F.2d 963, 975-76 (9th Cir. 1981). These prerequisites to a contributory infringement claim afford no real defense to VTR manufacturers or sellers. Under the appeals court's view, a copyright plaintiff may establish knowing infringement merely by showing that the manufacturer or seller was informed that some recording devices would occasionally be put to use by some purchasers for unauthorized copying. *Id.*, at 975. Moreover, the distributor of a recording device can always be held to have "materially contributed" to an instance of copyright infringement simply because the recorder is the means of copying television programs.

Sony Corp., 659 F.2d 963, 974-76 (9th Cir. 1981). Under the appeals court's decision, distribution of VTRs violates the copyright laws even though the recorders are often used to record uncopyrighted material, or to copy television programs with the permission of the copyright owner, or to play back pre-recorded material and make home movies.

Assuming for argument's sake that home video recording is copyright infringement, the application of contributory infringement liability to the mere sale of home video recorders is staggeringly overbroad. The logic of the Court of Appeals decision implies that manufacturers or distributors of audio tape recorders, photocopiers, or even cameras, also may be held liable for contributory infringement if these tools are used for unlawful copying. Under that principle, the copyright owner's property right in his own work is transformed into a power to control or arbitrarily increase the cost of technology that may (or may not) be used to copy that work.[3]

The doctrine of contributory copyright infringement has never before been extended so far. Traditionally, contributory copyright infringement has been found where defendants have actively assisted or supervised specific acts of infringement. For example, liability for contributory copyright infringement has attached when a defendant sells bootleg copies of a copyrighted work, *see Kalem Co.* v. *Harper Brothers*, 222 U.S. 55 (1911); *Screen Gems-Columbia Music, Inc.* v. *Mark Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966), or organizes the unauthorized performance or publication of copyrighted material, *Gershwin Publishing Corp.* v. *Columbia Artists*

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[3] As this Court has noted, the power to demand a royalty for the sale of an item implies control of the market for that item. *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 201 (1980).

Management, Inc., 443 F.2d 1159 (2d Cir. 1971), or permits infringing activity on premises under his supervision, *Famous Music Corp.* v. *Bay State Harness Horse Racing & Breeding Assoc.*, 554 F.2d 1213 (1st Cir. 1977); *Shapiro, Bernstein & Co.* v. *H. L. Green Co.*, 316 F.2d 304, 307-308 (2d Cir. 1963).

In none of these cases, however, has contributory liability been based upon the sole act of manufacturing or selling a copying machine, which is later used freely by the purchaser for his own purposes without the assistance or supervision of the manufacturer or seller. Indeed, the manufacturer or seller has no right or power to control the use of VTR machines after sale. Amicus is aware of no previous decision expanding the scope of copyright protection so as to restrain or "tax" the development of copying technology.

To the extent that Congress focused on the problem of contributory infringement in enacting the 1976 Copyright statute, 17 U.S.C. § 101 *et seq.*, it indicated that a defendant commits contributory or vicarious infringement only if he assists or supervises specific instances of infringing conduct. According to the House Judiciary Committee:

> [t]o be held a related or vicarious infringer in the case of performing rights, a defendant must either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commercial gain from the operation and either direct or indirect benefit from the infringing performance.

H.R. Rep. No. 1476, at 159-60, [1976] U.S. Code Cong. & Admin. News, at 5775-76. The Judiciary Committee never suggested that contributory liability might be carried a step farther, and applied against the individuals who built the auditorium in which the infringing activity took place.

By the same token, contributory liability cannot be imposed upon the manufacturer or seller of a VTR who has no knowledge, control, or supervision of that VTR's specific use after it has been purchased and taken home by the ultimate consumer.

A recent decision of this Court in the analogous area of trademark law has emphasized that contributory infringement must be predicated upon knowing assistance to particular infringers. *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, ____ U.S. ____, 102 S.Ct. 2182, 2188 n. 13 (1982); *id.*, at 2191-92 (White, J., concurring in the result). As Justice White stated, "a finding of contributory infringement requires proof of either an intent to induce illegal substitution or continued sales to particular customers whom the manufacturer knows or should know are engaged in improper palming off . . . . The mere fact that a generic drug company can anticipate that some illegal substitution will occur to some unspecified extent, and by some unknown pharmacists, should not by itself be a predicate for contributory liability." *Id.*, at 2191-92. The majority expressed the view that any weaker standard based on sales to the general market would be incorrect. *Id.*, at 2188 n. 13.

Patent law also provides considerable guidance to the resolution of the copyright question presented here. *Cf. Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 402 (1940) (patent law may be "persuasive" analogy in copyright area); *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488, 494 (1942). In the patent field, Congress and this Court have previously faced the problem of reconciling intellectual property rights with the strong national interest in promoting technological progress and free competition. See *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 230-231 (1964). Congress and this Court have concluded that the "monopoly" rights of the patent holder

can be amply protected by providing a cause of action for contributory infringement solely against the manufacturer or distributor of "non-staple" items—devices which have no substantial use except in connection with patent infringing activity. At the same time, the patent owner's monopoly has not been allowed to chill legitimate technical advances in other areas. Hence, no contributory infringement action may be maintained against the manufacturer or seller of "staple" articles, which are suitable for substantial non-infringing uses. 35 U.S.C. 271(c); see *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 200-201 (1980).

The reasoning underlying the staple/non-staple distinction in the patent area is applicable to copyright as well. Congress created state sanctioned monopolies in both patent and copyright for the purpose of encouraging inventiveness and intellectual effort. That very purpose dictates that no individual be permitted to employ his patent or copyright monopoly beyond its necessary boundaries to block or impose costs upon legitimate invention and intellectual progress by others. *See, e.g.*, *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U.S. 518, 530-531 (1972); *Morton Salt Co.* v. *G. S. Suppiger Co.*, *supra*, at 492. "[I]ndiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention." *Atlantic Works* v. *Brady*, 107 U.S. 192, 200 (1883).

Under the staple/non-staple test, VTRs must be regarded as staple articles, whose distribution is not contributory copyright infringement. VTRs have numerous uses, both as off the air recorders and as play back devices. Even if unauthorized home recording of copyrighted television broadcasts is copyright infringement,

VTRs have substantial additional, non-infringing uses as television broadcast recorders.[4]

VTRs may be used to record uncopyrighted material, or programs on which the copyright has lapsed. Thus, individuals may record televised presidential addresses, congressional debates and hearings (for example, the Watergate hearings), or judicial proceedings. These programs are uncopyrighted because they merely broadcast United States Government works for which no copyright is available. 17 U.S.C. § 105; *see Lipman* v. *Massachusetts*, 475 F.2d 565 (1st Cir. 1973) (no copyright for transcription of judicial proceedings).[5]

More significantly, VTRs may be employed to copy copyrighted material with the consent of the copyright owner. Numerous organizations consent to the home reproduction of their copyrighted broadcasts. At the trial of this case, the National Football League, National Hockey League, National Basketball Association, National Collegiate Athletic Association and National Reli-

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[4] The Court of Appeals' opinion appears to suggest a finding that VTRs are not suitable for substantial non-infringing uses. 659 F.2d, at 975. But the appeals court's observation about the non-infringing use of VTRs was based solely on reference to a legal treatise, and conflicted with the record on which the trial court relied when it ruled against contributory infringement liability. *See Universal City Studios* v. *Sony Corp.*, 480 F. Supp. 429, 437, 468. It is not the province of the Court of Appeals to engage in fact finding *de novo*. *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, ___ U.S. ___, 102 S.Ct. 2181, 2190 (1982).

[5] At least where the Government establishes the conditions of filming—as by specifying camera positions in filming judicial proceedings—the filming itself lacks sufficient originality to be copyrightable. 17 U.S.C. § 102; *see Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 59 (1884); *L. Batlin & Son, Inc.* v. *Snyder*, 536 F.2d 486 (2d Cir.) (en banc), *cert. denied*, 429 U.S. 857 (1976).

gious Broadcasters testified that they were agreeable to home recording of television broadcast material on which they have copyrights. (R.T. 2481-7; 2511-16; 2531-34; 2540-52; 2564-76).[6] The holders of copyrights in various educational programs also expressed their consent to home recording. (R.T. 2623-40, 2823-44, 2863-2902). Of course, it is not illegal to record copyrighted television programs with the owner's permission. 17 U.S.C. § 106.

Respondents in this case, like all other copyright owners, are entitled to protect their works from unauthorized publication. That right of protection, however, does not imply a right to challenge the manufacture or sale of VTRs which have substantial legitimate uses, simply because some purchasers may employ the recording devices in arguably infringing activity. In dealing with copyrights and patents, this Court has been reluctant to construe the intellectual property owner's protection so broadly as to retard other applications of inventiveness and creation, especially where new technology is concerned. *See, e.g., Teleprompter Corp.* v. *CBS, Inc.*, 415 U.S. 394 (1974); *Sears Roebuck & Co.* v. *Stiffel Company, supra*, 376 U.S. at 229-231. If this Court holds that private recording of television broadcasts does constitute copyright infringement, the copyright owner's right to prevent such infringement should not be treated as a license to regulate or foreclose the development of VTR technology, or to lay the "heavy hand of tribute" upon the creators of that technological advance. *See Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U.S. 84, 92 (1941).

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[6] "R. T." references are to pages of the trial transcript in this case.

II. IF THE MANUFACTURE OR SALE OF VIDEOTAPE RECORDERS IS HELD TO BE CONTRIBUTORY COPYRIGHT INFRINGEMENT THE RIGHTS OF SOME COPYRIGHT OWNERS WILL BE INCREASED AT THE EXPENSE OF THE RIGHTS OF OTHER COPYRIGHT OWNERS, AND THE PUBLIC INTEREST WILL SUFFER

In deciding that a copyright owner can maintain a claim for contributory copyright infringement against the manufacturer or seller of a recording device, the Court of Appeals expressed the view that it was vindicating the rights of the copyright owner. *Universal City Studios*, *supra*, 659 F.2d at 976. In fact, the Court merely expanded the rights of some copyright owners at the expense of the rights of other copyright owners.

Copyright gives the owner of a work the power, within certain limits, to dispose of his intellectual product as he sees fit. The right includes the power to withhold publication, to limit publication, or to disseminate the work. The 1976 Copyright Act specifically confers upon the copyright owner the right to authorize others to publish his work. 17 U.S.C. § 106. Thus, a copyright owner is expressly entitled to broadcast his work to the world in the hope that it will be recorded either for viewing at a later time, or for permanent preservation.

Although a VTR, like other recording machines, may be used to copy material without authorization, it may also be used to promote the copyright owner's interest in the widest possible distribution of his work. As the District Court found in this case, a VTR can be set to record television broadcasts automatically. The owner of a television program, therefore, can increase the size of his audience by urging VTR owners to record the show for later viewing at a convenient time. *Universal City Studios* v. *Sony Corp.*, 480 F. Supp. 429, 435-436, 438, 466-

467 (C.D. Cal. 1979).[7] By the same token, a copyright owner can amplify the impact of his work by encouraging the public to preserve it permanently for repeated viewing. Thus, a copyright owner might deliberately choose to take advantage of the availability of VTRs in disseminating his work.[8] The rights of those copyright owners who benefit from the VTR's capacity to increase audience size should not be subordinated to the preferences of copyright holders who disfavor VTRs.

Significantly, curtailing the availability of VTRs in the marketplace has a further harmful effect in decreasing public access to communications. Because VTRs can be used to record broadcasts for delayed viewing, recorders enable people to view programs which they might other-

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[7] The trial evidence indicated that most consumers use VTRs primarily to "time shift" for later viewing. *Universal City Studios*, 480 F. Supp. at 438. Independent studies support these findings:

A March 15, 1980 post-trial report prepared for the Corporation for Public Broadcasting showed home recording from Public Broadcasting Service ("PBS") stations was highest during fringe-time periods (the three hours before prime time) when *McNeil/Lehrer*, *Washington Week*, *Wall Street Week*, etc. were broadcast. At least 68% of PBS recordings is played back within two days.

A "Home Video" post-trial study prepared for the FCC dated 1 November 1979 synopsized "five major studies of VCR use," finding "it is clear that the principal use of the VCR to date is for time-shift viewing." Also, "Because rating services are prepared to report such time-shifting, broadcasters should actually be helped by this consumer convenience. An audience that was previously unavailable to them is now viewing, and the viewing is properly attributed in audience reports . . . . Most [play-back] occurs relatively quickly after the recording (almost all within a week). Most of such recordings are viewed only once (usually only by members of that household) . . . ." (study at pp. 61-62).

[8] The ABC television network, for example, has indicated that it is considering creating a station specifically designed to broadcast programs for home recording. "ABC's Bold Leap Into Pay TV," *Broadcasting*, Vol. 102, No. 18, May 3, 1982, at 27-28.

wise miss. VTRs thereby increase the opportunities for individuals to view broadcasts of considerable public importance, such as Congressional hearings, electoral debates or religious programming. Furthermore, VTRs afford individuals special educational opportunities by permitting televised historical events—for example, man's walk on the moon—to be preserved for future viewing. Many of these broadcasts will be uncopyrighted, or will be authorized by copyright holders for home reproduction. See pp. 8-9, *supra*.

It is impossible to envision the full potential of video recording technology. To prevent or penalize the distribution of that technology to the public, therefore, may be to foreclose public benefits that cannot be foreseen now.

Copyright law need not clash with the development and distribution of videorecording technology. VTRs, like cameras, or even pen and paper, may be used to serve or to injure the interests of copyright owners. Even if unauthorized home recording of television broadcasts violates copyright law, this Court should not allow some copyright owners to foreclose the means of authorized copying. The rights of those copyright owners who oppose home recording of their broadcasts may be sufficiently protected without outlawing technology that expands the communicative power of other copyright owners, and that increases the public's access to information.

CONCLUSION

For the foregoing reason, Amicus respectfully submits that this Court should reverse the decision below insofar as it holds the manufacturer or distributors of VTRs liable for direct or contributory copyright infringement.

Respectfully submitted,

MAX L. GILLAM*
LATHAM & WATKINS
555 South Flower Street
Los Angeles, California 90071
(213) 485-1234

MICHAEL CHERTOFF
LATHAM, WATKINS & HILLS
1333 New Hampshire Avenue N.W.
Suite 1200
Washington, D.C. 20036
(202) 828-4400

Counsel for Sears, Roebuck
and Co. as Amicus Curiae

**Counsel of Record*

MARY E. WOYTEK
Sears Tower
Chicago, Illinois 60684
(312) 875-9240

Of Counsel

Amicus Brief

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No. 81-1687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SONY CORPORATION OF AMERICA, et al.,

Petitioners,

—vs.—

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF ON BEHALF OF TDK ELECTRONICS CO., LTD.

KO-YUNG TUNG
(Counsel of Record)
ADAM YARMOLINSKY

TUNG, DRABKIN & BOYNTON
One Citicorp Center
New York, New York 10022
212-751-0566

Attorneys for the Amicus Curiae

August 28, 1982

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AMICUS CURIAE BRIEF ON BEHALF OF TDK ELECTRONICS CO., LTD.

The brief *amicus curiae* is submitted by TDK Electronics Co., Ltd. ("TDK"), a Japanese corporation.[1] Consents have been obtained from all the parties, copies of which have been filed with the Clerk of this Court.

1 TDK operates in the United States through its wholly-owned subsidiary, TDK U.S.A. Corporation (a New York corporation), which in turn owns TDK Electronics Corporation (a New York corporation), TDK Corporation of America (a California corporation), TDK Magnetics Corporation (a California corporation) and Saki Magnetics, Inc. (a California corporation).

Petitioners Sony Corporation et al. seek the reversal of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit and the adoption of the District Court's judgment and opinion.[2] TDK supports their Petition.[3]

INTEREST OF AMICUS CURIAE

Whether or not home use recording constitutes copyright infringement directly affects this *amicus curiae*. TDK is the world's largest manufacturer of audio and video tapes and produces ferrite and other electronic components used in VTRs. In 1981, U.S. sales of TDK video and audio tapes amounted to approximately $160 million.

TDK, through its U.S. subsidiaries, directly employs more than 750 persons in the United States. Currently over 80% of the TDK video and audio tapes sold in the United States are manufactured in the United States. Audio tapes are produced at TDK's plant in California and video tapes in Georgia. TDK has invested well over $50 million to build and equip those two plants. As the plants' production capacity expands, those domestic production percentages are projected to increase.

TDK is submitting a separate brief because the arguments made in this brief have been neither specifically presented by the parties nor examined by the lower courts.

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2 The Court of Appeals' judgment and opinion below are reported at 659 F.2d 963 (9th Cir. 1981), and appended to Petitioners' Petition for Writ of Certiorari as Appendix A (cited herein as "Pet. App. 1 et seq."). The judgment and opinion of the District Court below are reported at 480 F. Supp. 429 (C.D. Cal. 1979) and appended to Petitioners' Petition for Writ of Certiorari as Appendix B (cited herein as "Pet. App. 31 et seq.").

3 Petitioners' Petition will be cited herein as "Petition."

SUMMARY OF ARGUMENT

Home use recording[4] is fair use for the following reasons.

(1) Both the Court of Appeals and the District Court below erred in their respective modes of analysis of the Copyright Revision Act of 1976 (the "1976 Act"). Specifically, each court analyzed as separate and distinct the two questions of (a) whether courts may look to legislative history to interpret Section 106 of the 1976 Act and (b) whether home use recording satisfied the four factors mentioned in Section 107 of the 1976 Act.

The correct mode of analyzing the 1976 Act is to examine whether it is proper to resort to legislative history in order to define the "fair use" exception contained in Section 107 of the 1976 Act. We conclude it is. The "clear language" of Section 106 may erect a wall blocking a view to its legislative history, but Section 107 opens a window in that wall.

(2) Legislative history of Section 107 clearly evinces that home use recording is to be deemed fair use. The legitimate rights of copyright holders were outweighed by the dual concerns of privacy of the general citizenry and impossibility of enforcement. The equities having already been balanced in the legislative process, judicial application of the four factors enumerated in Section 107 to home use recording is obviated.

(3) Both the Court of Appeals and the District Court below erred in their application of the four factors enumerated in Section 107. Both lower courts are under the impression that the four factors are cumulative tests for fair use determination. Not only are the four factors merely illustrative, but they were misapplied with respect to home use recording. Proper application results in a finding that home use recording is fair use.

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4 As used herein, "home use recording" means video recording of free off-the-air TV programs for private, non-commercial viewing, *viz*, "time-shifting."

ARGUMENT

HOME USE RECORDING IS FAIR USE.

1. In Determining Fair Use under Section 107, Courts Must be Guided by Legislative History.

Section 106 of the 1976 Act grants the "bundle of rights" exclusively to the owner of the copyright. Noting that "The statutory framework [of the 1976 Act] is unambiguous; the grant of exclusive rights is only limited by statutory exceptions" (Pet. App. 6), the Court of Appeals refused to look to legislative history of Section 106. However, the "fair use" exception embodied in Section 107 is sufficiently (and intentionally) ambiguous and flexible to benefit from the illumination of legislative history.[5]

The judicial doctrine of fair use (statutorily recognized) is an omnibus "safety valve" against certain unintended (i.e., unfair) consequences of an absolute copyright monopoly. Lurking in the corners of the doctrine of fair use is a legislative (and judicial) recognition that a literal enforcement of statutory provisions for copyright protection in certain circumstances may collide with superior interests worthy of protection.[6]

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5 *See generally* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892 (1982).

6 The District Court below recognized that when Congress passed the 1976 Act, it was sensitive to the problems of trespassing on the individual's right of privacy:

> Congress can constitutionally legislate against some activity which may occur in the home, but doing so necessarily requires caution. . . . [I]n balance, Congress did not find that protection of copyright holders' rights over reproduction of their works was worth the privacy and enforcement problems which restraint of home use recording would create. [Pet. App. 65.]

See also Stanley v. Georgia, 394 U.S. 557 (1969); *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970).

The codification of the common law of fair use was not intended to freeze its definition or application. The House Report[7] accompanying the bill for the 1976 Act declared:

> "The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. . . .
>
> "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." (Quoted and cited in Pet. App. 67.)

The Court of Appeals itself noted that:

> "The history states that the legislation endorses the purposes and general scope of the *judicial doctrine* of fair use, but there is no disposition to freeze the doctrine in the statute." (Pet. App. 14; emphasis in the original.)

Recognizing the fair use exception as a judicially developed "equitable rule of reason" (quoted and cited in Pet. App. 86), Congress consciously refrained from statutorily defining the exact contours of the doctrine and left it up to the courts to apply it flexibly on a case-by-case basis:

> "Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." (Quoted and cited in Pet. App. 67.)

The Court of Appeals recognized the impossibility of exact formulation:

> "[I]t is there [in the legislative history of Section 107] emphasized that the endless variety of situations and

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7 H.R. Rep. No. 1476, 94th Cong. 2d Sess. 66 (1976), *reprinted in* [1976] U.S. Cong. & Admin. News 5659 (cited herein as the "1976 House Report"). The corresponding Senate Report is S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975).

> combinations of circumstances that can arise in particular cases precludes the formulation of exact rules." (Pet. App. 14.)

Accordingly, the fair use doctrine must be applied flexibly, not rigidly, in light of Congressional intentions which are chronicled in legislative history.

2. Legislative History Shows that Home Use Recording is Fair Use.

Examination of the legislative history of Section 107 reveals home use recording is to be fair use since (a) no legitimate interests of the copyright holder would be unfairly compromised and (b) enforcement of copyright infringement would raise the specter of invasion of the constitutional right of privacy, as well as of practical impossibility. So long as the off-the-air recording (whether audio or video) is for non-commercial, private home use, it is to be exempted as fair use. No further inquiry is necessary.

Mere days before Congress passed the 1971 Amendment,[8] Representative Kastenmeier of Wisconsin, Chairman of the Subcommittee responsible for the amendment,[9] engaged in the following exchange with Representative Kazen of Texas regarding non-commercial home recording:

> "MR. KAZEN. Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?
>
> "MR. KASTENMEIER. Yes.

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8 The Sound Recording Act of 1971. For discussion on the relevance of the legislative history of the 1971 Amendment to the 1976 Act, see Petition 14-16 and Pet. App. 56-68.

9 In addition to his role of Chairman of the House Subcommittee responsible for the 1971 Amendment, Representative Kastenmeier was also the sponsor of the general copyright revision legislation and a member of the Conference Committee that finally brought about the 1976 Act.

"MR. KAZEN. In other words, if your child were to record a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?

"MR. KASTENMEIER. This is not included in the bill. I'm glad the gentleman raises the point.

"On page 7 of the report, under 'Home Recordings', Members will note that under the bill the same practice which prevails today is called for; namely, *this is considered both presently and under the proposed law to be fair use.* The child does not do this for commercial purposes. This is made clear in the report." (Quoted and cited in Pet. App. 64; emphasis added.)

The portion of the House Report referred to by Mr. Kastenmeier stated:

"Home Recording

"In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. *Specifically, it is not the intention of the Committee to restrain the home recording,* from broadcasts or from tapes or records, of recorded performances, where the home recording is *for private use* and with no purpose of reproducing or otherwise capitalizing commercially on it." (Quoted and cited in Pet. App. 60-61; emphasis added.)

In June 1971, Ms. Barbara Ringer (Assistant Register of Copyrights who later that year became Register of Copyrights) discussed off-the-air recording with Representative Edward Beister of Pennsylvania before Subcommittee No. 3 of the House Committee on the Judiciary:

"MR. BEISTER. . . .

"I can tell you I must have a small pirate in my own home.

"My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set.

". . . [T]his legislation, of course, would not point to his activities, would it?

"MISS RINGER. I think the answer is clearly, 'No, it would not.'

"I have spoken at a couple of seminars on video cassettes lately, and this question is usually asked: 'What about the home recorders?'

"The answer I have given and will give again is that this is something you cannot control. You simply cannot control it." (Quoted and cited in Pet. App. 62-63.)

Further, in contrasting public distribution of bootleg films for private home use recording, Ms. Ringer observed:

"But I do not see anybody going into anyone's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping.

"MR. BEISTER. Secondly with respect to video cassettes, are we approaching an additional problem, not with respect to private use, but with respect to public distribution after it has been retrieved over a home set?

"MISS RINGER. The answer is very definitely, 'yes'.

"For years, the motion picture industry has been faced with bootlegging problems, much of it deriving from the 1[6] mm. prints that were distributed to the Armed Forces and got out of control. The film industry has had a very active policing activity for years.

> "I think that this problem is going to undergo a quantum increase when video cassette recorders are freely available. But I would say that there is a big difference, and I think it is something that you might consider. In that area, they have got copyright protection, and in this area, who knows? It is certainly not protectable under the Federal statute." (Quoted and cited in Pet. App. 63.)

The foregoing manifests the undisputed view in the Congress that home use recording is to be considered fair use. Accordingly, it is not necessary for the courts to analyze home use recording against the four factors listed in Section 107.

3. Considered under the Four Factors, Home Use Recording is Fair Use.

While Congress refused to define statutorily the fair use doctrine, it did nonetheless offer four factors to consider in determining fair use. Both lower courts are under the misguided impression that the four factors are cumulative tests of fair use determination.[10] This is not so.

The four factors were offered merely to be illustrative rather than determinative or cumulative.

> "Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though *in no case definitive or determinative,* provide some gauge for balancing the equities. These criteria have been stated in

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10 Though the District Court states that the four "factors are neither exclusive nor required[, t]he factors are illustrative, not definitive" (Pet. App. 70), it nonetheless appears to be somehow compelled to clear each of the tests.

> various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107." (1976 House Report 65; emphasis added.)

Distracted by the enumerated four factors, both the Court of Appeals and the District Court have failed to see the forest for the trees. The essence of fair use is *fairness*—"the doctrine is an equitable rule of reason" (*id.*) and the four factors merely "provide some gauge for balancing the equities" (*id.*).

Even if the four factors listed in Section 107 were to be applied as "determinative tests", home use recording would be found to be fair use. Of the four factors the first and last factors are particularly relevant here.

The purpose and character of the use is video recording of free off-the-air TV programs for private viewing at a later time. Thus the use at issue here is exactly that intended by the copyright holder, namely, to permit television viewers to watch the TV program without charge.[11] Time shift copying changes nothing. It is no more significant than the act of putting aside a book for later reading. This use is clearly not commercial; it is not even "for non-profit educational purposes" in that such purposes imply performances for the benefit of others. Here the viewer is recording the program for his own benefit or for that of his immediate family.

Nor can the viewer avoid exposure to the interspersed advertising material (from which the copyright holder indirectly derives revenue) any more easily by home use copying than he can by turning off the commercials during direct viewing of a program.

The Court of Appeals appears to find it fatal to fair use that the purpose and character of the use is "copying of entertain-

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11 Query what Respondents' position would be with respect to the person who charges admission to see free off-the-air television programs at the time of telecast (without taping). For example, a bar may charge extra admission to customers to sit and watch the World Series.

ment works for convenience" (Pet. App. 19). Whether the work itself or the purpose of copying is educationally meritorious or mere entertainment is irrelevant. The Copyright Act does not pass judgment—if it did, Walt Disney's Donald Duck might not be copyrightable. The Constitution empowered Congress to enact copyright laws "to promote the progress of science and useful arts." If the work is worthy of copyright, its copying cannot be denigrated because of its contents for fair use purposes.[12]

Clearly if the use is commercial, it would not constitute fair use, but this case is limited to non-commercial uses. The 1976 House Report explains:

> "The Committee has amended the first of the criteria to be considered—'the purpose and character of the use'—to state explicitly that this factor includes a consideration of 'whether such use is of a commercial nature or is for non-profit educational purposes.' This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions." (1976 House Report 66.)

The non-commercial purpose, while not conclusive under this test, is persuasive (if not presumptive)[13] in finding fair use.

For home use recording, the second and third factors are neutral—the nature of the copyrighted works of U/D is audiovisual television programs substantially all of which (including commercials) are recorded.

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12 For a more legalistic approach to this issue, see Petition 25-26.

13 *See* Part 2 of this Argument, *supra* at 6-9.

In this case, the fourth factor[14] would be positive, rather than negative, in finding fair use. Home use recording does not adversely affect the potential market for or the value of U/D's copyrighted works. In fact, it only enhances their potential market and value.

There are basically three separate markets for U/D's copyrighted works. The first market consists of television stations; the second, home users of pre-recorded video cassettes; and the third, movie theatres for public showing. Since the potentiality and the value of the copyright work in the television station market are determined essentially by ratings, which in turn depend on the number of viewers (including the number of home use recordings), home use recordings will have a positive effect for the copyright holder.[15]

It is conceivable that the potentiality and the value of the copyrighted work might be reduced in the other two markets by time-shifting.[16] For example, a person who missed seeing a TV program at the time of its telecast might buy it as a pre-recorded video cassette or go to the movie theatre to see it (assuming such alternatives were available). However, the very fact of U/D's sale of its copyrighted works to TV stations for free off-the-air broadcast may adversely affect the other two markets. Obviously, U/D has considered this potential negative effect but has determined that the potential positive effect on the TV station market offsets the potential losses on the other two markets. Time shifting would merely magnify the existing imbalance of the effects on the various markets without reversing the tip of the scales.

Since the net cumulative effect of home use recording on the three markets is positive, U/D cannot claim to have been

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14 *See* 3 Nimmer on Copyright § 13.05[A][4] (1981) for the application of the fourth factor.

15 *See* NBC's study on the effect of VTR copying on commercial TV broadcasting, cited in Petition 7-8.

16 Multiple recording or librarying practices are not considered here.

injured by home use recording. In fact U/D concedes that it has not suffered any monetary damages, and both the Court of Appeals and District Court so found. The Court of Appeals erred in assuming potential harm.[17]

In analyzing the effect of reproduction, it is essential to distinguish a "hard copy" such as a book from a "soft copy" such as a TV program. The copyright holder of a hard copy publication can control the number of copies in existence. But the copyright holder of a soft copy publication relinquishes his right to control the number of copies. The substantial copying of a "hard copy" almost invariably has a negative effect on the potentiality and value of the copyrighted work. The copying of an entire book, even for private use, may reduce by one the number of books sold. The same would be true for pre-recorded video cassettes. However, that is not the case when the copyright work is published in a "soft" ephemeral fashion.[18] A soft copy is published through electrical waves in the air. Once released to the air, it is gone. The number of soft copies is potentially infinite, determined by the sole discretion of the viewers. Similarly, once a book is sold, the copyright owner cannot control who reads it, when and how many times it is read. By time shifting, the number of receivers of the electric waves are increased, not reduced.

It is fair to permit copying where there is no actual or even potential harm to the copyright holder; and it is unfair to prohibit or exact a fee when the copyright holder benefits from the copying. The Court below erred in failing to examine the overall fairness of use involved here. Application of the doctrine of fair use cannot avoid the question of what is fair under all the facts and circumstances.

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17 Pet. App. 25.

18 To this extent, the fair use analyses by the Court of Appeals and the District Court of *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975), are misdirected.

Both the Senate and House Committee Report on the 1976 Act point out that "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change" (Pet. App. 67). The VTR is a typical half way technology. The time cannot be far off when the home viewer will be able to time-shift his favorite programs by storing them temporarily in his home computer or by calling them up via cable or satellite from a central computer—with or without commercials. This interim technology is a bit clumsy, but it appears to harm no one. In due course, it may be necessary for the Congress to address the question of applying the copyright law to some of these new situations. In the meantime, this case seems an appropriate one for the application of the fair use doctrine in the exercise of judicial prudence.

CONCLUSION

For the reasons stated above, we respectfully pray the Court to reverse the opinion and judgment of the Court of Appeals, to clarify the doctrine of fair use (long characterized as "the most troublesome in the whole law of copyright"[19]) and to apply the doctrine to this case.

Respectfully submitted,

KO-YUNG TUNG
(Counsel of Record)
ADAM YARMOLINSKY

Attorneys for the Amicus Curiae

August 28, 1982

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19 *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939), (*per curiam*, presided over by L. Hand, J.).

Amicus Brief

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IN THE

Supreme Court of the United States

October Term, 1982

No. 81-1687

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE TOSHIBA CORPORATION AND TOSHIBA AMERICA, INC. IN SUPPORT OF PETITIONERS

DONALD J. ZOELLER
(Counsel of Record)
MUDGE ROSE GUTHRIE & ALEXANDER
20 Broad Street
New York, New York 10005
(212) 701-1000

Attorneys for Amici Curiae Toshiba Corporation and Toshiba America, Inc.

Of Counsel:

JOEL DAVIDOW
HERVE GOURAIGE
MITCHELL B. NISONOFF
BARRY WERBIN
Mudge Rose Guthrie & Alexander

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

SONY CORPORATION OF AMERICA, *et al.*,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE TOSHIBA CORPORATION AND TOSHIBA AMERICA, INC. IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

This brief is submitted on behalf of *amici curiae* Toshiba Corporation ("Toshiba") and Toshiba America, Inc. ("TAI") in support of petitioners' request that this Court reverse the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963 (9th Cir. 1981) ("*Sony* action") and reinstate the judgment of the district court, 480 F. Supp. 429 (C.D. Cal. 1979). The written consent of all parties required by this Court's rule 36 is on file with the Clerk of this Court.

INTEREST OF AMICI CURIAE

Toshiba is a Japanese corporation that manufactures videotape recorders (VTRs) and videotape cassettes for use in VTRs. TAI, a wholly owned American subsidiary of Toshiba, distributes Toshiba VTRs and videotape cassettes throughout the United States. Subsequent to the decision of the Court of Appeals in the *Sony* action, one of the respondents here, Universal City Studios, Inc. ("Universal"), sued fifty (50) manufacturers, distributors, and advertisers in the VTR industry, including Toshiba and TAI. *Universal City Studios, Inc. v. RCA*, No. 81-5723 (C.D. Cal. filed Nov. 6, 1981) ("*RCA* action"). Respondents' claims in the present action and those Universal is making in the *RCA* action raise novel copyright issues not previously considered by any court. These issues should now be settled by this Court.

The claims in the *Sony* and *RCA* actions are closely related in that both cases include copyright infringement and unfair competition claims based upon the manufacture, sale, and use of VTRs. Notwithstanding differences in the two cases (e.g., the differences in the marketing of VTRs between Sony on the one hand and defendants in the *RCA* action on the other, and the changes in consumer use of VTRs since trial of the *Sony* action), this Court's decision will have major impact in the *RCA* action and in clarifying the law affecting this emerging industry. Accordingly, Toshiba and TAI will be directly affected by the disposition of the present action.

ARGUMENT

I. HOME VIDEOTAPE RECORDING FOR PRIVATE USE CONSTITUTES FAIR USE

In light of the unique equitable considerations in this case supporting a finding of fair use, the Court of Appeals erred in failing to uphold the district court's determination that home videotape recording for private use constitutes fair use. The exclusive rights granted to copyright owners in the Copyright Revision Act of 1976, 17 U.S.C. § 106 (Supp. IV 1980) (the "1976 Act"), are expressly limited by the doctrine of fair use, which evolved through case law and was codified subsequently in Section 107 of the 1976 Act. The fundamental precept permeating Section 107, and the case law both before and after the statute's enactment, is that fair use is an equitable rule of reason. House Comm. on the Judiciary, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5679 ("1976 House Report"). Under this rule of reason, a fair use determination may require subordinating "the copyright holder's interest in a maximum financial return to the greater public interest. . . ." *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). Apart from listing four nonexhaustive statutory factors for courts to consider, Congress intentionally left open Section 107 for judicial interpretation. This open-ended statutory framework was intended by Congress to permit judicial consideration not only of the four statutory criteria, but also of any other relevant equitable criteria. 1976 House Report, 1976 U.S. Code Cong. & Ad. News 5659, 5680.[1]

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1. As stated in the House Report,

> The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to

A. Equity and the Statutory Factors of Section 107 Justify a Fair Use Finding in this Case

The equities in the present case are overwhelmingly balanced in favor of a finding of fair use:

> (1) Home VTR use occurs in the privacy of the consumer's home, and there is no suggestion of either (a) a commercial or profit-motivated use, or (b) extensive dissemination of copyrighted works in any organized or systematic fashion.
>
> (2) Respondents have chosen to disseminate their works over the public airwaves free of charge to individuals in their homes and are usually compensated in direct relation to the size of the viewing audience which is increased by home VTR use.
>
> (3) As it cannot be ascertained beforehand whether or when any particular televised program will be rebroadcast, the transitory nature of such programs requires capturing the programs *in their entirety* at the moment they are broadcast in order to have access to the programs at any time other than that pre-selected by broadcasters.
>
> (4) There has been no showing that respondents' markets will, or are likely to, be adversely affected by home VTR use.

The only reasonable conclusion that emerges from a full consideration of the peculiar features of home VTR use,

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particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

1976 House Report, 1976 U.S. Code Cong. & Ad. News at 5680; *see also* S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975).

balanced against the rights of copyright owners, is that such use is a fair use. By failing to consider the equitable factors discussed above, the Court of Appeals misapplied the enumerated fair use criteria of Section 107, and avoided a flexible balancing of these considerations by fashioning rigid rules precluding a fair use finding.[2] Therefore, the decision below should be reversed.

Section 107 lists four factors which should be considered, among others, in deciding whether to grant a fair use exemption: (1) the purpose and character of the use, including whether such use is of a commercial or non-profit educational nature; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. No single factor is determinative on the fair use issue.

In considering the first factor, the district court properly emphasized the fact that use of VTRs in the home is not for profit or commercial purposes. On the other hand, the Court of Appeals concluded that the not-for-profit nature of the use was not significant unless it was for an "educational" purpose:

> The district court ... emphasized the noncommercial and home use of the copyrighted material. The statute does not, however, draw a simple commercial/noncommercial distinction. The statute contrasts commercial and non-profit educational purposes, and there is no question

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2. Moreover, the Court of Appeals ignored the district court's findings in favor of fair use. A fair use determination is a factual finding, subject to the clearly erroneous standard of rule 52(a) of the Federal Rules of Civil Procedure. *See MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981); *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). The Court of Appeals improperly substituted its own findings of fact for those of the district court without even referring to the standard of rule 52(a) or stating any reason suggesting that the lower court's findings were clearly erroneous. As this Court twice recently held, this is reversible error. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 50 U.S.L.W. 4592 (U.S. June 1, 1982); *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982).

> that the copying of entertainment works for convenience does not fall within the latter category.

659 F.2d at 972 (footnote omitted). This approach is clearly contrary to the pertinent legislative history. The 1976 House Report indicates that "*the works and uses to which the doctrine of fair use is applicable are as broad as the copyright law itself.*" 1976 House Report, 1976 U.S. Code Cong. & Ad. News at 5679 (emphasis added). The Report further notes:

> The Committee has amended the first of the criteria to be considered—'the purpose and character of the use'—to state explicitly that this factor includes a consideration of 'whether such use is of a commercial nature or is for non-profit educational purposes.' This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.

The amendment emphasized non-profit educational purposes merely as an *example* of a non-profit use and does not foreclose a finding of fair use as to other non-profit uses, such as those involved in the present case. Since all home videorecording involved in this case is non-profit, such nature of the use should cut in favor of a finding of fair use.

The private context within which home VTR use occurs also should have been accorded weight by the Court of Appeals in its consideration of the purpose and character of the use. Aside from the significant constitutional right of privacy in the home, *see Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965), the private, spontaneous, and personal nature of the use is important

because it cuts against any notion of widespread dissemination or any " 'highly organized and systematic program for reproducing videotapes on a massive scale.' " *Encyclopaedia Britannica Educational Corp. v. Crooks*, No. 77-560, LEXIS slip op. at 14 (W.D.N.Y. June 21, 1982) (available on LEXIS, Genfed library, Dist file) ("*Encyclopaedia Britannica*") (quoting 480 F. Supp. at 450).[3] Indeed, all cases where a non-profit use was held not to be fair use involved the public dissemination of copies of the copyrighted work. *See, e.g., Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962) (musical arrangement based on plaintiff's song distributed to and performed by school choir); *Encyclopaedia Britannica* (widespread dissemination of videotaped works for classroom use). *Compare Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975) (finding of fair use despite public dissemination). In no situation has a non-profit, non-public, personal use of a copyrighted work been found not to be "fair use" within the meaning of Section 107.

The Court of Appeals seeks to circumvent this impediment by suggesting in a footnote that the present case does involve commercial exploitation. The court states that "[petitioners] are obviously not in the business of promoting home videorecording for strictly altruistic reasons." 659 F.2d at 972 n.9. This comment completely misses the mark. The relevant inquiry is whether the home use of the VTR is commercial use, not whether VTRs are sold for a profit.

As to the second factor listed in Section 107, "the nature of the copyrighted work," two unique aspects of respondents' marketing, not discussed by the Court of Appeals, are relevant and further support a fair use finding.

First, the exposure to home viewers of copyrighted works, such as respondents', enhances a "public interest" in the arts and culture of our society. *See, e.g., Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d

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3. Indeed, "home-use off-the-air" recording in the present case was directly distinguished from the type of widespread, systematic distribution program — albeit for a non-profit educational use — found to exist in *Encyclopaedia Britannica*. LEXIS slip op. at 14, 21.

Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) ("Whether the [fair use] privilege may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information....").[4] Failure to recognize a societal benefit from increased viewing of respondents' works resulting from home VTR recording was error on the part of the Court of Appeals.

Second, since television programs are available for viewing only at particular times, absent reruns, programs missed by a viewer at the time of broadcast are "lost." This is especially true with respect to the industry practice known as "counter-programming" where "networks frequently broadcast their better and stronger programs at the same time." 480 F. Supp. at 441. "Timeshifting" enables the VTR user to view one program while simultaneously recording another from a single television set, or to view a program broadcast at a time when the user is not at home. Timeshifting therefore affords the viewer a wider latitude in terms of the number and choice of programs that can be viewed and serves to increase access to copyrighted works.

As a practical matter, timeshifting usually serves no real function unless the entire program is copied. While "the amount and substantiality of the portion used in relationship to the copyrighted work as a whole" is one of the factors

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4. The Court of Appeals stated that "there seems to be some indication that the scope of fair use is greater when informational type works, as opposed to more creative products, are involved. . . . If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted." 659 F.2d at 972. Under Section 107, however, entertainment works have been given the same fair use treatment as informational works. Thus, for example, in *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964), the court found a parody appearing in Mad Magazine to be fair use, stating:

> While the social interest in encouraging the broad-gauged burlesques of Mad Magazine is admittedly not readily apparent, and our individual tastes may prefer a more subtle brand of humor, this can hardly be dispositive here.

329 F.2d at 545. The Court of Appeals therefore improperly injected its own subjective viewpoint as to the public interest in entertainment works.

considered on the fair use issue, the "substantiality factor" should not bar a finding of fair use when a VTR is used for timeshifting. As the district court correctly concluded:

> Like the other variables in the fair use analysis, the substantiality factor is inextricably bound with the issue of harm. Obviously, *in the normal case of copying*, the effect that the infringing copy has on the market for the original will depend to a large extent on whether the copy can substitute for the original.... Home use recording off-the-air usually involves copying the entire work. This fact, however, does not defeat the defense of fair use, *because all factors must be taken together*. When considered with the nature of the material and the noncommercial private use, this taking of the whole still constitutes fair use, because there is no accompanying reduction in the market for 'plaintiff's original work.'

480 F. Supp. at 454 (emphasis added) (footnote omitted).

The Court of Appeals, however, gave such undue weight to the substantiality factor that a balanced consideration of all the factors was precluded. *See Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1177 n.15 (5th Cir. 1980) ("The idea that copying an entire copyrighted work can never be fair use is an overbroad generalization, unsupported by the decisions...."); *accord Williams & Wilkins Co. v. United States*, 487 F.2d at 1353; *Encyclopaedia Britannica*, LEXIS slip op. at 25.[5]

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5. Relevant to the "amount" aspect of this third factor is the singular copying that occurs in home VTR use, *see* S. Rep. No. 473, 94th Cong., 1st Sess. 63 (1975), a point completely ignored by the Court of Appeals. A VTR user makes only one copy of any specific program and there is no attendant dissemination. In contrast, cases where a non-profit use was made of a copy but was held not to be fair use involved the making of multiple copies from one or more works by a single person or entity. *See Encyclopaedia Britannica* (defendant systematically copied and distributed educational television programs); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962) (multiple copies of a single work were made and distributed by an individual).

The fourth factor listed in Section 107 (the "harm factor") is "the effect of the use upon the potential market for or value of the copyrighted work." It is evident, however, that there is no reduction in the potential market for respondents' works. The district court addressed various propositions offered by respondents on the harm issue, noting that "[respondents] *admit* they are to some extent inconsistent and illogical." 480 F. Supp. at 451 (emphasis added). The district court considered both the repeated and non-repeated viewing of a copy made by a VTR and found, with respect to both, that respondents' claims of harm were too speculative and too full of unwarranted assumptions to negate a finding of fair use. 480 F. Supp. at 451-52. This factual finding by the district court was not reversed by the Court of Appeals as "clearly erroneous."

The essence of respondents' claim of harm is that the "copying indirectly reduces the revenue by affecting ratings and advertising." *Id.* at 452. Respondents contend that home VTR use enables the user to avoid watching advertisements, either by using the pause control or by fast-forwarding, and that this affects profits. *Id.* at 435-36. Aside from the consideration that the use of the pause or fast-forward controls cannot be considered activity violative of the copyright laws,[6] the rule of television advertising "is that the larger the perceived rating of the program carrying the commercial, the larger the advertising fee. . . . For rerun programming, larger audiences obtained during prior showing generally increase[s] the expected audience, and hence the fee, for rerun licensing."

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6. Even without a VTR, a viewer can easily avoid watching commercials by walking away from the television or by changing a channel. On remote-control TV sets, viewers can easily avoid listening to a commercial by employing the "mute" control. Similarly, use of a VTR to "avoid" commercials involves the "active" participation of the viewer. When a viewer records with a VTR in the direct mode, the pause control can be used to avoid taping a commercial; however, the commercial must be "monitored" to allow the viewer to release the pause control. In the timeshift mode, commercials *are* recorded and the only way they can be ignored on playback is for the viewer to use the fast-forward feature on a VTR. Yet here, too, the viewer must "monitor" the playback to know when the commercial begins and ends.

Id. at 440, 441.[7] By increasing the number of programs of different broadcasters that will be viewed, home VTR usage can thereby raise the ratings of particular programs and, in a direct manner, increase the compensation to the copyright holder. 480 F. Supp. at 466.[8]

The Court of Appeals' treatment of the "harm" factor is unsatisfactory for two reasons. First, the Court of Appeals imputes harm from the mere fact that "copies made by home videorecording are used for the same purpose as the original." 659 F.2d at 974. The court labelled this the "functional test." *Id.* at n.13. This type of mechanical finding of potential harm is not supported by case law. Those cases which have found

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7. The district court noted that both the Nielson and Arbitron rating services, used extensively in the broadcast industry, have the capacity to measure VTR usage. 480 F. Supp. at 441.

8. As this Court noted in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974):

> By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor. When a broadcaster transmits a program under license from the copyright holder he has no control over the segment of the population which may view the program . . . but rather he gets paid by advertisers on the basis of all viewers who watch the program. . . . From the point of view of the broadcasters, such market extension may mark a reallocation of the potential number of viewers each station may reach, a fact of no direct concern under the Copyright Act. *From the point of view of the copyright holders, such market changes will mean that the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the CATV market.*

415 U.S. at 412–13 (emphasis added). Likewise, appropriate compensation to the copyright owners can easily be determined based on a calculation of the size of the direct broadcast market augmented by the size of the VTR market. Although respondents argued that harm would result from recording off-the-air and saving the tape for more than one subsequent viewing (*i.e.*, "librarying" the tapes) and from the avoidance of commercials through the use of the pause and fast-forward shifting, they have failed to demonstrate any injury from these practices. 480 F. Supp. at 467–68.

negative effects on the potential market for a copyrighted work involved situations far different from the one now before this Court. *See, e.g., Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (near verbatim use of plaintiff's financial reports in defendant's financial publication was "blatantly self-serving, with the obvious intent, if not the effect, of fulfilling the demand for the original work"); *Encyclopaedia Britannica*, LEXIS slip op. at 15, 16 (defendants' wholesale copying and systematic distribution of plaintiffs' educational television programs to schools clearly cut into the market for plaintiffs' works). This is not a case where petitioners are competing with respondents for an audience; indeed, there is no competition here that could dilute the audience for respondents' works.

Second, the Court of Appeals erred by taking into account the "*cumulative* effect of mass reproduction of copyrighted works made possible by videorecorders" in its harm analysis. 659 F.2d at 974. Section 107 looks only to the "use made of a work in any *particular* case...." (emphasis added). The district court was presented with evidence of only a limited number of allegedly infringed works, copied by four individuals. *See* 480 F. Supp. at 436–38. In terms of these particular instances of copying, the harm that respondents hypothesized would result cannot be viewed as having any potential effect on the market for respondents' work.[9]

In sum, consideration of the specific criteria enumerated in Section 107, and other unique pertinent factors of home VTR use, requires a finding of fair use. The Court of Appeals failed to consider all relevant factors under Section 107 and improperly rejected the district court's well-considered factual determinations. As discussed fully in the Brief for the Petitioners, the Court of Appeals also ignored the clear

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9. Nevertheless, even assuming that the cumulative effect of all home use recordings was properly considered, there is no evidence to support respondents' allegations of "assumed" harm. Respondents presented no evidence by advertisers that would even give rise to an inference that advertisers would be less willing to air commercials or pay lower advertising fees merely because of the home use of VTRs, even where librarying takes place.

indication of Congress that home VTR recording should not be considered violative of copyrights.

The notion that VTR use can be anything but a fair use of respondents' works runs counter to any concept of fair use as an equitable rule of reason. Accordingly, this Court should reject the Court of Appeals' erroneous construction of the doctrine of fair use in this case.

B. The Court of Appeals' Productive Use Theory Creates an Impermissible Rigid Rule Against Fair Use

The Court of Appeals also erred by creating a rigid rule barring a finding of fair use in all cases where a copy of a copyrighted work is used for the same end for which the original was intended.[10] The Court of Appeals held that "[w]ithout a 'productive use,' *i.e.*, when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use." 659 F.2d at 971-72.[11]

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10. Such rigid rules negating a finding of fair use have been rejected repeatedly by courts. For example, in *Encyclopaedia Britannica*, the court stated:

> Plaintiffs argue that off-the-air videotaping amounts to such substantial copying that this practice can never be considered fair use under the copyright statutes. *Such a sweeping contention must be rejected* since 'the idea that copying an entire copyrighted work can never be fair use is an overbroad generalization, unsupported by the decisions, and rejected by years of accepted practice.'

Encyclopaedia Britannica, LEXIS slip op. at 25. *See also Berlin v. E. C. Publications, Inc.*, 329 F.2d 541, 543 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

11. In support of this proposition, the Court of Appeals quotes extensively from *Exemptions and Fair Use in Copyright* (1978) by Leon Seltzer. 659 F.2d at 970. A full reading of Seltzer's passage, however, reveals that Seltzer supports petitioners' contention that copying of a copyrighted work for its intrinsic use should not preclude a finding of fair use. Seltzer's reference to "the list" is not a reference to the factors listed in Section 107, as the court indicates, but to a list of eight examples of fair use contained in a 1961 Report of the Register of Copyrights "orienting Congress on the issues to be dealt with in copyright revision." L. Seltzer at 23. As Seltzer makes clear, he

The Court of Appeals first notes that Section 107 lists "criticism, comment, news reporting, teaching ..., scholarship, or research" as nonexhaustive *examples* of fair use. 659 F.2d at 969, 970. Nevertheless, as support for its productive use theory, the court views fair use as being restricted to these types of "traditional use" examples. *Id.* at 970. The Court of Appeals' analysis is contrary to the intent underlying the Copyright Act. Section 107 is structured to require the consideration of all factors relevant to any particular type of usage. A "productive use" analysis fails to consider all the Section 107 factors or to consider other factors relevant to developing VTR technology and, as shown above, completely ignores the societal benefit resulting from home VTR use.[12]

The rigid "productive use" test invoked by the Court of Appeals loses sight of the unique context of home VTR recording of televised programs, both copyrighted and non-copyrighted, which are transmitted over the public airwaves. The determination of whether home VTR use is fair use, while supported by the legal principles enunciated in prior cases, cannot be restricted to the factual situations of those cases which have not dealt with VTR technology. It was error therefore for the Court of Appeals to restrict fair use to what it labeled the "traditional" uses appearing in prior cases.

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is concerned that this list was too restrictive of the fair use doctrine and therefore criticizes the absence of considerations in the list regarding the intrinsic use of photocopies.

12. *See supra* at 7-8. In *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975), the Court of Claims found fair use where an intrinsic use was made of a photocopied work. As the district court stated, "[t]he *Williams & Wilkins* case, affirmed by an evenly divided Supreme Court, has little precedential value. Its holding is specifically limited to its unique factual situation.... *The value of the case lies in its demonstration of the relevance of the fair use doctrine when copyright protection is tested by new technology and non-commercial use.*" 480 F. Supp. at 450. The district court merely used the case to compare its facts. 480 F. Supp. at 450-52. The Court of Appeals mischaracterized the district court's opinion by stating that the district court used "*William & Wilkins Co.*'s distortions of the fair use rational to justify an application of the doctrine which ... stretches fair use beyond recognition and undermines our traditional reliance on the economic incentives provided to authors by the copyright scheme." 659 F.2d at 970.

Moreover, a "productive use" test foregoes any analysis of harm on the potential market for respondents' works. There is no justification for inflexible rules in this case where there has been no showing that respondents' markets will be harmed or that petitioners are competing with respondents. "The line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria." *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *accord Triangle Publications, Inc. v. Knight Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175–76 n.12 (5th Cir. 1980). Accordingly, to the extent that the court denied a fair use exemption based on its productive use test, the court manifestly erred.

II. THE COURT OF APPEALS ERRED IN HOLDING PETITIONERS CONTRIBUTORILY LIABLE FOR COPYRIGHT INFRINGEMENT

As demonstrated above, the Court of Appeals erred in not finding that home videotape recording for private use constitutes a fair use. Even if some consumer use conceivably amounted to infringement, there would still be no basis for holding petitioners contributorily liable for copyright infringement.

Contributory copyright liability derives from the common law tort doctrine that "one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasors." *Screen Gems–Columbia Music, Inc. v. Mark–Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966). *See generally* Restatement of Torts, § 876 (1939); *cf.* 35 U.S.C. § 271(b) ("Whoever actively induces infringement of a patent shall be liable as an infringer."). The circumstances in which a person has been held contributorily liable for another's infringement of copyright only have been those where that person (the "contributory infringer") and the "direct infringer" were *in pari delicto*:

(1) The contributory infringer commits the direct infringement in concert with the direct infringer or pursuant to a common design with him. *See Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 327 F. Supp. 788 (S.D.N.Y. 1971), *rev'd on other grounds sub nom. Screen Gems - Columbia Music, Inc. v. Metlis & Lebow Corp.*, 453 F.2d 522 (2d Cir. 1972) ("*Screen Gems*"); Restatement of Torts, § 876(a) (1939).

(2) The contributory infringer knows of the direct infringer's "infringing" conduct and gives substantial assistance or encouragement to the direct infringer. *See Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); Restatement of Torts, § 876(b) (1939).

(3) The contributory infringer gives substantial assistance to the direct infringer and his own conduct, separately considered, constitutes copyright infringement. *See Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 365-66 (9th Cir. 1947); Restatement of Torts, § 876(c) (1939).

None of these circumstances, in which the defendants can be considered "aiders and abettors" of the infringement, are present in this case.

Petitioners have neither acted in concert with particular consumers using their own VTRs, nor given substantial assistance or encouragement to such persons. Petitioners herein manufacture and sell VTRs, which, as shown below, are capable of substantial noninfringing uses. Once sold to a consumer, that person can use the machine in any way he deems appropriate; petitioners simply have no control over the uses to which particular consumers will put their machine.

There is no question that VTRs are capable of substantial noninfringing uses:

> (1) the recording of material where the copyright owners have consented to such recording, *see* 480 F. Supp. at 468;
>
> (2) the recording of non-registrable material, e.g., programming as to which registration and infringement action are regularly rendered impossible by the erasing of the programming from the tape which had given it tangible form, *see* 480 F. Supp. at 468;
>
> (3) the recording of non-copyrightable material, *see, e.g.*, 17 U.S.C. § 105 ("United States Government works");
>
> (4) the recording of copyrightable, but not registered, material, *see* 17 U.S.C. § 411 (registration prerequisite to infringement suit);[13]
>
> (5) the recording of material on which the copyright has expired;
>
> (6) the playback of pre-recorded videocassettes which are licensed by the copyright owner; and

13. Review of M. B. Nimmer, *Nimmer on Copyright*, § 12.04[A] at 12-39-40 (1981), the pages cited by the Court of Appeals (659 F.2d at 975 n.16), indicates that virtually all television programs are *copyrightable*, not copyrighted (i.e., registered), material.

(7) the recording and playback, in conjunction with a home videocamera, of films made by the VTR owner.

No prior case has assigned contributory copyright liability to a person who merely manufactures or sells equipment which subsequently may be used for infringing uses, as well as substantial noninfringing uses, by ultimate consumers. As this Court indicated in its unanimous opinion in *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911) (Holmes, J.):

> [I]t is said that the defendant did not produce the representations, but merely sold the films to jobbers, and on that ground ought not to be held. In some cases where an ordinary article of commerce is sold nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer. *It has been held that mere indifferent ... knowledge on the part of the seller that the buyer ... is contemplating such unlawful use is not enough.*

222 U.S. at 62 (emphasis added).[14]

Based on its analysis of the facts of this case and the legal principles discussed above, the district court held that petitioners were not contributorily liable. The district court held that petitioners had not engaged in the kind of activities which would make them contributory infringers:

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14. The standard set forth in *Kalem* is consistent with that used in analogous patent and trademark contributory infringement cases. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 50 U.S.L.W. 4592 (U.S. June 1, 1982) (where this Court recently refused to sustain a finding of contributory trademark infringement where evidence merely showed that a generic drug company anticipated some illegal substitutions of drugs by some unknown pharmacists to some unspecified extent); *Sims v. Western Steel Co.*, 551 F.2d 811, 817 (10th Cir.), *cert. denied*, 434 U.S. 858 (1977) (contributory patent infringement involves the "active participa[tion] in the line of conduct of which the actual infringer was guilty. Thus he should be in the nature of an accessory before the fact.").

> Here, no employee of Sony, Sonam or DDBI had either direct involvement with the allegedly infringing activity or direct contact with purchasers of Betamax who recorded copyrighted works off-the-air. Henry's Camera sold the Betamax to Griffiths' sons but no testimony shows that the store or its employees knew that Griffiths would record copyrighted works.

480 F. Supp. at 460. The district court further held:

> *there was no evidence that any of the copies made by the ... witnesses in this suit were influenced or encouraged by [petitioners'] advertisements....* [Petitioners] here do not arrange for and direct the programming for the infringing activity.... [Petitioners] here do not sell or advertise the infringing work.

480 F. Supp. at 460–61 (emphasis added). The district court's findings with respect to contributory liability are subject to the "clearly erroneous" standard of rule 52(a) of the Federal Rules of Civil Procedure. As this Court recently held in a trademark case with particularly similar facts, *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 50 U.S.L.W. 4592 (U.S. June 1, 1982), the Court of Appeals' substitution of these factual findings without finding them clearly erroneous is reversible error. 50 U.S.L.W. at 4596 & n.19; *see also Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982).

While the Court of Appeals (659 F.2d at 975–76) and the district court (480 F. Supp. at 459–61) both purported to adopt the same definition of a contributory copyright infringer as "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another...." *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971), the Court of Appeals applied the "knowledge" and "inducement" elements of this definition in a manner not supported by either prior case law or logic.

With respect to the "knowledge" element, the Court of Appeals erred in holding:

> It is only necessary that a copyright defendant have knowledge of the infringing *activity*. It cannot be argued that the corporate appellees cannot be held to have the knowledge that the Betamax will be used to reproduce copyrighted material, some of which appellants own.

659 F.2d at 975. The Court of Appeals' decision goes against prior case law in holding that mere general knowledge that infringement will inevitably occur is sufficient to hold the equipment manufacturer liable. For example, in *Gershwin*, the Court of Appeals for the Second Circuit found that a concert artists' managing company was contributorily liable because the company knew that these artists were performing copyrighted works, unlicensed by the copyright owners, at a concert sponsored by the Port Washington Community Concert Association, but nevertheless helped form and direct the association, program the compositions presented and create an audience for the association's concert. 443 F.2d at 1161. The managing company thus knew that *particular* copyrighted works were being infringed by *specific* persons, who were aided and abetted in the infringements by the company. Therefore, the "infringing *activity*" alleged in *Gershwin* was the infringing conduct of *particular* direct infringers and *not* the conduct (both non-infringing and infringing) of performing artists and concert associations generally. *See also Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 365-66 (9th Cir. 1947) (infringing motion picture photoplay writer contributorily liable for selecting the material for the photoplay knowing that it had been used in another picture); *Screen Gems*, 327 F. Supp. at 791-92 (agency employee who handled the infringer's account was "a knowing party to the piracy").

Even assuming petitioners may have known that individuals were likely to utilize the Betamax to record copyrighted works, that is insufficient, by itself, to prove "constructive knowledge" of the recording of particular copyrighted works. *See Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62 (1911)

(Holmes, J.), discussed *supra* at 18.[15] It is even less sufficient to find that petitioners had induced, caused or materially contributed to the allegedly infringing conduct of the home VTR users. On this issue the Court of Appeals states, without elaboration or analysis, that:

> "The corporate defendants are sufficiently engaged in the enterprise to be accountable."

659 F.2d at 975–76. The Court makes no attempt to explain what "enterprise" petitioners are supposed to be "sufficiently engaged in." Even assuming the Court of Appeals was correct on the fair use issue, all that petitioners did was manufacture or sell equipment capable of infringing as well as substantial non-infringing uses. Petitioners should not be held contributorily liable for infringing uses so removed from the manufacture and sale of VTRs.

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15. The Court of Appeals' treatment of the "staple article of commerce" question is also unsatisfactory. In its discussion of that issue, the Court of Appeals misstated the district court's opinion by indicating that the district court relied on the "staple article of commerce" theory for its determination. 659 F.2d at 975. In fact, the district court only applied the underlying rationale for the patent law "staple article of commerce" rule, "[w]hether or not ... the Betamax is capable of 'substantial' noninfringing use." 480 F. Supp. at 461. In so doing, the district court stated, reflecting Justice Holmes' decision in *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911):

> Commerce would indeed be hampered if manufacturers of staple items were held liable as contributory infringers whenever they 'constructively' knew that some purchasers on some occasions would use their product for a purpose which a court later deemed ... to be an infringement.

480 F. Supp. at 461.

III. A COMPULSORY ROYALTY IS NOT AN APPROPRIATE REMEDY

The Court of Appeals, in its remand, suggested that an acceptable resolution in this case may be the awarding of a "continuing royalty." 659 F.2d at 976. A compulsory royalty is not an appropriate remedy because: (1) it is not a remedy provided by Congress; (2) as a measure of future damages, a determination of an appropriate royalty is too speculative and uncertain; and (3) a comprehensive royalty scheme is beyond the institutional competence of courts to devise and administer.

Congress has not created a compulsory royalty scheme in the VTR area.[16] Congress has not specified a "reasonable royalty" as a remedy for copyright infringement, or as a measure of damages.[17] Furthermore, in those situations in which it has created a compulsory royalty, Congress has vested responsibility and authority to determine a reasonable royalty payment and make distribution thereof to injured copyright holders in a specialized agency and not in the courts.[18]

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16. Six bills are currently pending in Congress which would exempt home VTR use from copyright liability: H.R. 4808 (introduced by Rep. Stanford Parris (R-Va.) on October 21, 1981); S. 1758 (introduced by Senators Dennis DeConcini (D-Ariz.) and Alphonse D'Amato (R-NY) on October 20, 1981; H.R. 5488 (introduced by Rep. Don Edwards (D-Calif.) on February 9, 1982); H.R. 5705 (introduced by Rep. Edwards on March 3, 1982); H.R. 4783 (introduced by Rep. John Duncan (R-Tenn.) on October 20, 1981); H.R. 5250 (introduced by Mr. Thomas Foley (D-Wash.) on December 16, 1981); and Amendment No. 1333 to S. 1758 (introduced by Senator Mathias on March 4, 1982 to replace his Amendment No. 1242 to S. 1758 previously introduced on December 16, 1981). The Mathias Amendments, H.R. 5705 and H.R. 5488, would create a compulsory licensing scheme with royalty payments in the VTR area.

17. *See Widenski v. Shapiro, Bernstein, & Co.*, 147 F.2d 909 (1st Cir. 1945) ("in lieu of actual damages" provision of 1909 Act, predecessor of the "statutory damages" provision in 1976 Act, is a substitute for the reasonable royalty rule applied in patent cases). *Cf.* 35 U.S.C. § 284 (damages for patent infringement).

18. The Copyright Royalty Tribunal has jurisdiction to determine rates applicable to the compulsory royalties for secondary transmissions by cable systems, 17 U.S.C. §§ 111, 801(b)(2), for the making and distribution of pho-

In *Fortnightly Corporation v. United Artist Television Inc.*, 392 U.S. 390 (1968), an analogous case in a developing technology (cable television), the Solicitor General in a *amicus curiae* brief had urged the Court to "imply" a license for the various cable television performances. The Solicitor General proposed this as a "compromise decision . . . that would . . . accommodate various competing considerations of copyright, communications, and antitrust policy." 392 U.S. at 401. This Court, however, declined the invitation, stating: "*That job is for Congress.*" 392 U.S. at 401 (emphasis added).

A compulsory royalty as a remedy for copyright infringement can be considered the equivalent of, or a measure of, prospective liquidated damages, i.e., reasonable "user" fees for the future. Assuming that a district court has equitable power to determine appropriate remedies other than those provided by Congress, the remedy of a compulsory royalty should be precluded, as a matter of law, as too speculative and uncertain in this case to afford an accurate measure of the amount of prospective damage. The claims of respondents regarding future injury were determined to be too speculative for purposes of the determination of injunctive relief,[19] and are likewise too speculative for the purpose of damage calculation,

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norecords of nondramatic musical works, 17 U.S.C. §§ 115, 801(b)(1), for public performances by coin-operated phonorecord players ("jukeboxes"), 17 U.S.C. §§ 116, 801(b)(1), and for the use of certain works in connection with noncommercial broadcasting, 17 U.S.C. §§ 118, 801(b)(1). The Tribunal is also responsible for receiving and distributing royalty fees payable under the compulsory cable and coin-operated phonorecord player licenses. 17 U.S.C. §§ 111(d)(3), 116(c), 801(b)(3). *See generally Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367 (D.C. Cir. 1982).

19. As the district judge stated:

> This is a doubtful case. An injunction would deprive the public of a new technology capable of noninfringing uses . . . .
>
> Courts look for irreparable harm to the plaintiff before issuing injunctive relief, and here plaintiffs' fears of irreparable harm are speculative at best.

480 F. Supp. at 464.

even in terms of effect on a "potential market."[20] Moreover, the causal links between the sale of particular name-brand VTRs (such as the Betamax), the generalized expectation that VTR owners will record copyrighted works in general, and any injury to the value of the works of an objecting copyright owner in particular, are too attenuated. *See, e.g., Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) ("[T]he jury may not render a verdict based on speculation or guesswork."); *see also Illinois Brick Co. v. Illinois*, 431 U.S. 720, 747 (1977) ("[G]iven the difficulty of ascertaining the amount absorbed by any particular indirect purchaser, there is little basis for believing that the amount of the recovery would reflect the actual injury suffered."). Here, any estimate of whether or to what extent any particular manufacturer's VTRs would be used to record any copyrighted works belonging to respondents, and any estimate of the economic harm to respondents such recording might cause, would involve the kind of speculation or guesswork in calculating damages which this Court has condemned.

Assuming that a district court were to impose a royalty scheme, a determination would have to be made as to the standards determinative of a proper royalty. As demonstrated above, a royalty determination as a measure of *prospective* damages to the copyright owner is too speculative, and therefore should be precluded as a matter of law. Standards that are designed to achieve generalized societal goals, such as those specified by Congress for the Copyright Royalty Tribunal in which the royalty rates applicable to compulsory licenses are to be calculated,[21] are likewise beyond the institutional competence of a court to establish. To make an accurate determination of a royalty rate, a district court would have to hold hearings, probably over an extended period of time, and to accept evidence from parties other than those

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20. The district court suggested that use of a VTR might enable a viewer to see more programs and thus *increase* the value of the programs. *See* discussion *supra* at 11.

21. *See, e.g.*, 17 U.S.C. § 801(b)(1).

before the court.[22] Assuming a district court, nonetheless, could devise a "proper" royalty scheme, it may have to maintain jurisdiction over the action to settle controversies over the distribution of royalty fees, and perhaps monitor the fairness of the royalty rates. Active judicial involvement in such administration will be constrained by the limited expertise and time of federal judges. As recently stated by the United States Court of Appeals for the District of Columbia in a case involving judicial review of distribution of funds collected under a statutorily authorized compulsory royalty scheme, "[c]laims of this sort are generally well beyond the expertise or authority of courts ... and Congress made clear its awareness of our limitations by making the [Copyright Royalty] Tribunal the primary arbiter of these claims." *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d at 367, 374 (D.C. Cir. 1982). *See also United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161–66 (1948) (judiciary is unsuited to supervise competitive bidding system).

CONCLUSION

Home videotape recording should be considered a fair use. As a private, non-commercial and non-profit activity related to programs freely broadcast to millions of home VTR users, this use cannot be deemed to so diminish the market for respondents' works as to justify restriction of individual freedom. As a new technology not dealt with in prior cases, VTR use is entitled to a balanced and flexible analysis under Section 107, to comport with the intent underlying the statute.

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22. The Copyright Royalty Tribunal's experience with determining royalty rates is instructive. For example, the Tribunal published notice of its first proceeding to determine the royalty rate for the phonorecord compulsory license on January 2, 1980. 45 Fed. Reg. 63 (1980). During the spring of 1980, the Tribunal accepted submissions of economic studies and legal motions, and then commenced evidentiary hearings that lasted forty-six days and involved thirty-five witnesses. *See* Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords, 46 Fed. Reg. 10,466, 10,466–67 (1981). Closing arguments followed in November, and the Tribunal published the new rate on January 5, 1981, over a year after it published its initial notice of a proceeding. 46 Fed. Reg. 891 (1981).

The Court of Appeals' uncompromising approach to the fair use question is unwarranted, unreasonable, and unprecedented.

By merely manufacturing or selling VTRs, petitioners cannot be held contributorily liable for copyright infringement, because once a VTR is sold to a particular consumer, petitioners simply have no control over that consumer's uses of the VTR. Petitioners are in no way *in pari delicto* with their customers. The impropriety of requiring payment of a compulsory royalty in this case merely underscores the unfairness of holding petitioners contributorily liable for copyright infringement.

For all of the foregoing reasons, and for the reasons stated in petitioners' brief, this Court should reverse the judgment and opinion of the Court of Appeals for the Ninth Circuit and should reinstate the decision and judgment of the district court.

Dated: August 26, 1982
New York, New York

Respectfully submitted,

Donald J. Zoeller
(Counsel of Record)
Mudge Rose Guthrie &
Alexander

Attorneys for Amici Curiae Toshiba Corporation and Toshiba America, Inc.

Of Counsel:

Joel Davidow
Herve Gouraige
Mitchell B. Nisonoff
Barry Werbin

Mudge Rose Guthrie & Alexander

Amicus Brief

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No. 81-1687

IN THE

Supreme Court of the United States

October Term, 1981

SONY CORPORATION OF AMERICA, et al.,
Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,
Respondents.

BRIEF OF VIARE PUBLISHING, AMICUS CURIAE, IN SUPPORT OF SONY CORPORATION OF AMERICA, ET AL., PETITIONERS

PETER F. MARVIN
(Counsel of Record)
CHRISTIAN H. MILLER
FREDERIC M. KRIEGER
MILLER SCHREIBER & SLOAN
1529 Walnut Street
Philadelphia, PA 19102
(215) 567-4900
Attorneys for Viare Publishing, Amicus Curiae

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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This Brief is Submitted with the Written Consent of All Parties on File with the Clerk of This Court.

I. INTEREST OF VIARE PUBLISHING AMICUS CURIAE

Viare Publishing ("Viare") is the publisher of *Video Review*, a magazine sold through mail subscriptions and at newsstands. It is distributed throughout the United States. The articles and features presented by the magazine concentrate upon new developments in video equipment, viewing material and television programming. In addition to the revenue generated by the sale of copies of the magazine, Viare derives its income from the advertising placed in it by manufacturers of video equipment, tapes and accessories. New products, and equipment that enhances the utility of existing products are the subject of much of the advertising placed in the magazine. This new product advertising is a major source of the revenue that supports *Video Review*. From both an editorial and a financial perspective, continuing innovation in the home electronics industry is most important to the continuing vitality of *Video Review*.

The most important product newly developed within the past fifteen years for video use, the video tape recorder ("VTR"), is at the center of this dispute. Viare believes that it is imperative to encourage the development and distribution of new video products such as the VTR, as well as home electronic products in general. The decision in this case by the United States Court of Appeals for the Ninth Circuit, if permitted to stand, will have a directly contrary result. That decision will inhibit and thwart new technology. It must be reversed. For this reason, Viare respectfully submits this Brief, Amicus Curiae, in support of Petitioners Sony Corporation of America, *et al.* This Brief is submitted with the written consent of all parties on file with the Clerk of this Court.

Video Review is affiliated with *Consumer Electronics*, published by CES Publishing Corp. The two magazines share a common focus upon home electronic products. A Brief Amicus Curiae In Support of The Petition for Writ of Certiorari was filed by CES Publishing Corp. Several of the arguments made in that Brief are made at this time on behalf of Viare in this Brief.

II. SUMMARY OF ARGUMENT

The Court of Appeals for the Ninth Circuit held that home use of VTRs for recording, for private noncommercial purposes, programs broadcast free of charge, did not constitute a "fair use" of copyrighted materials. The Court of Appeals did not apply correctly the fair use doctrine either as that doctrine was enunciated in earlier cases or as that doctrine is set forth in Section 107 of the Copyright Revision Act of 1976, 17 U. S. C. § 107. The Court of Appeals, contrary to the intent of the Congress, applied the fair use doctrine in a narrow manner, a manner hostile to new technology. This honorable Court should reverse the decision of the Court of Appeals and accord the fair use doctrine the flexible, equitable office for which it was created and enacted. Such a decision will encourage and promote the development of new technology.

III. ARGUMENT

A. The Holding of the Court Below That "Intrinsic Use" Cannot Constitute "Fair Use" Unjustifiably Constricts the Well-Established Scope of the Fair Use Doctrine.

1. The Decision Below Conflicts With Clear Legislative Intent Regarding the Proper Application of the Fair Use Doctrine.

a. No Single Factor of the Four Listed in Section 107 Is Sufficient to Preclude a Finding of Fair Use.

In addressing whether the use in the home of videotape recorders for the recording of publicly broadcast television programs constitutes a "fair use" of copyrighted programs within the meaning of 17 U. S. C. § 107, the Court of Appeals for the Ninth Circuit emphasized that such recording is for the purpose of "intrinsic," rather than "productive" use. The use at issue is deemed "intrinsic," in that programs recorded by the VTR perform the same function as that provided by the original broadcasted copies: VTR copies, like the originals, enable private program viewing for the purpose of education or entertainment.

The court below, in response to the challenge of determining the correct application of the fair use doctrine in the context of this new technological frontier made possible by the VTR, stated baldly the proposition that "intrinsic use" cannot constitute "fair use": "Without a 'productive use', *i.e.*, when copyrighted material is reproduced for its intrinsic use, the . . . copying of the sort involved in this case precludes an application of fair use." *Universal City Studios, Inc. v. Sony Corporation of America*, 659 F. 2d 963, 971-72 (9th Cir. 1981).

The Court of Appeals' decision appears to dictate that a fair use analysis be two-staged. First, the inquiry is directed to the use of the reproduced work. Under the Court of Appeals' reasoning, finding the use to be "intrinsic" ends the analysis, because "fair use" is then deemed impossible. Only if the use is found to be not "intrinsic" would the Court of Appeals' analysis permit the inquiry to proceed to a traditional fair use analysis, employing the four illustrative criteria developed in the cases and set forth by Congress in 17 U. S. C. § 107. *Universal City Studios, Inc. v. Sony Corporation of America, supra,* 659 F. 2d at 971-72.[1]

The proposition that intrinsic use and fair use are mutually exclusive immediately works an unwarranted and inappropriate narrowing of the fair use doctrine. The two-stage analysis is inconsistent with the fair use doctrine. Indeed, by focusing on an aspect of the use made, the Court of Appeals has without so stating elevated above the others one of the criteria presented by Congress as illustrative. This Court should prevent any such erosion of the fair use doctrine.

In holding that intrinsic use "*precludes* an application of fair use," *Universal City Studios, Inc. v. Sony Corporation of America, supra,* 659 F. 2d at 972 (emphasis added), the Court of Appeals actually employed as a threshold test the first of the four fair use criteria listed in 17 U. S. C.

1. In *Jartech, Inc. v. Clancy,* 666 F. 2d 403 (9th Cir. 1982), decided by the United States Court of Appeals for the Ninth Circuit some three months after its decision in this case, the Ninth Circuit reiterated, with but slight modification, its conclusions that the inquiry is two-staged and that a finding of "intrinsic use" precludes a finding of fair use: "In *Sony,* this Court found that the use made by the alleged infringers was the same intrinsic use to which the copyright holders expected protection from unauthorized use. Such a finding is a strong indication of finding no fair use." *Jartech v. Clancy, supra,* 666 F. 2d at 407.

§ 107—"the purpose and character of the use . . . ." It used this single test to dispose entirely of the question whether home VTR recording for private, noncommercial purposes constituted fair use.

Section 107 identifies four factors that are material to a determination that a particular use of copyrighted matter is a fair use. The first factor of the four directs a court conducting a fair use inquiry to consider "the purpose and character of the use, including whether such use is of a commercial nature . . . ." The presence of a commercial use is to be weighed by the court against the conclusion that the use is fair. "Intrinsic" use is not mentioned in Section 107. However, although the statute expressly indicates that the characteristic of commercial use lessens the propriety of a finding of fair use, even the presence of the explicitly mentioned characteristic "commercial use" alone is insufficient to preclude a finding of fair use: "[T]he fact that a given use is 'of a commercial nature' does not necessarily negate a fair use determination . . . ." 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05 (1981) (citing, *e.g.*, *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F. 2d 1171 (5th Cir. 1980); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966), *cert. denied*, 385 U. S. 1009 (1967); *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D. N. J. 1977)).

In *Triangle*, the United States Court of Appeals for the Fifth Circuit rejected the reasoning of a district court decision strikingly similar to that of the Ninth Circuit here. The district court in *Triangle* had held the commercial purpose of the use under consideration to preclude a finding of fair use: "The [District] Court established what amounts to virtually a *per se* rule that commercial motive destroys the defense of fair use." *Id.* at 1175. The Court of Appeals in *Triangle* held that the preclusive nature of

the rule applied by the lower court was incompatible with the intent of Section 107: "Clearly, § 107 makes commercial motive *relevant* to fair use analysis. But it is certainly *not decisive*." *Id.* at 1175 (emphasis added). The Court proceeded to analyze the question of fair use in terms of each of the criteria listed in Section 107 and concluded on that basis that the use at issue was fair, notwithstanding its commercial purpose.

Similarly, in *Meeropol v. Nizer*, 560 F. 2d 1061 (2d Cir. 1977), *cert. denied*, 434 U. S. 1013 (1978), the United States Court of Appeals for the Second Circuit held that a purpose of commercial gain, although relevant to the question whether the use under consideration was fair, did not *preclude* a finding of fair use. The court stressed that all of the factors listed in Section 107 "must be evaluated in concert." *Id.* at 1069.

It is thus well-established that the presence of a commercial use, which is specifically mentioned in Section 107 (1) as a factor that weighs against fair use, does not foreclose a finding of fair use. It follows *a fortiori* that the factor of intrinsic use, a subject on which the statute is silent, may not be applied to preclude a finding of fair use.

b. The Application of Arbitrary, Fixed Rules Is Antithetical to the Established Principle That Fair Use Analysis Should Be Equitable and Flexible.

The proposition applied by the court below that the sole characteristic of intrinsic use precludes a use from being fair is itself an example of the rigid formulae that proper fair use analysis must reject: "The line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or

fixed criteria." *Meeropol v. Nizer, supra,* 560 F. 2d at 1068.[2]

In spite of the well-established prohibition against arbitrary rules or fixed criteria, articulated in *Meeropol,* the rule applied below by the Ninth Circuit is manifestly both "arbitrary" and "fixed." The rule is arbitrary because there is no reason to suppose that intrinsic use, such as, for example, viewing a VTR recording of an educational program, is inherently less deserving of fair use protection than altered-purpose use, such as making wallpaper out of copies of pages of a telephone book.

The requirement that fair use analysis avoid the application of fixed criteria is a corollary of the notion that the fair use doctrine comprises an equitable rule of reason: "[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 65 (1976). The rule fashioned by the court below is "fixed" in that there is no suggestion in the court's language that it should be applied as a rule of reason on a case-by-case basis. Instead, the court's formulation commands that the factor of intrinsic use be deemed preclusive of fair use irrespective of variations in the application of the other enumerated criteria that invariably will occur under different factual conditions. Thus, the approach taken by the court below contravenes the well-established principle that fair use analysis should be flexible.

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2. The legislative history of 17 U. S. C. § 107 (1976) unambiguously states that that section embodies the judicial doctrine of fair use: "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976). Thus, the description of the fair use doctrine set forth in *Meeropol* pertains to the characteristics of the doctrine under the 1976 Copyright Act.

c. The Decision Below Should Be Reversed as It Contravenes the Intent of the Congress as Set Forth in 17 U. S. C. § 107.

The holding of the Ninth Circuit that intrinsic use is inconsistent with fair use is at odds with legislative intent. For example, the Congress which passed the 1976 Act "did not require independent use when finding home use sound recording to be fair use." *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 427, 453 (C. D. Cal. 1979), *rev'd on other grounds*, 659 F. 2d 963 (9th Cir. 1981).

Moreover, Section 107 is intended both to embody the judicially fashioned doctrine of fair use as it existed at the time when the 1976 Act went into effect and to provide a framework for the continued evolution of the doctrine.[3] Notwithstanding the elusive definition of what the doctrine *is*, several assumptions about what it *is not* have remained constant in the cases that preceded the 1976 Copyright Act, in the legislative history of the Act, and, with the exception of the decision below, in the ensuing decisions rendered. No single factor precludes a finding of fair use; neither arbitrary nor fixed criteria inform whether a particular use is fair. The decision below is completely contrary to each of these foundational assumptions.

2. The Rule Applied Below Must Be Rejected Because It Restricts Public Access to Information.

As stated in Section III.A.1, *supra*, fair use analysis has been predicated consistently on the notion that no single criterion can be dispositive of the question whether a particular use is fair. The decision below, in holding the presence of a single factor to preclude a finding of fair

3. *See* note 2, *supra*.

use, disregarded the securely established prohibition against the application of narrow, arbitrary and fixed criteria in a fair use context. The impact of the Court of Appeals' error on the societal benefits provided by the fair use doctrine could be profound.

The purpose that animates the fair use doctrine is "to balance the author's right to compensation for his work, on the one hand, against the public's interest in the widest possible dissemination of ideas, on the other." Latman, "Fair Use of Copyrighted Works" 5 (Sen. Comm. on Judiciary Study No. 141960) *quoted in, Triangle, supra,* 626 F. 2d at 1174. If the decision of the court below is permitted to stand, the public's interest in obtaining the widest possible access to ideas will be severely impaired in honor of a rule that is not required for the protection of authors.

Implicit in the principle that no single factor is sufficient to preclude a finding of fair use is the judgment that the author's right to compensation for his work is adequately protected by the application of the fair use factors "in concert." The preclusive rule applied below therefore constricts the previously recognized scope of the right of the public to obtain access to ideas.

The Ninth Circuit approach would reject a fair use defense where, although the use is intrinsic, all of the other factors listed in Section 107 militate strongly in favor of a finding of fair use. This approach would prevail whether or not it was actually necessary to advance a countervailing interest in protecting the needs of an author. However, the only justification for reducing public access to information is the interest in assuring for authors the rewards necessary to stimulate continuing creative incentive. That interest, as stated above, has long been fulfilled without resort to a preclusive rule by the application of all four factors in fair use analysis. Thus,

the preclusive rule enunciated below, by constricting the appropriate scope of fair use, restricts public access to information. It would do precisely that in cases where a fair use defense would prevail were all four factors considered, without being necessary to fulfill any need that may arise to augment the rewards of authorship. The Ninth Circuit rule thus improperly diminishes the public's right to the dissemination of ideas.

The harmful impact of the decision below will extend far beyond the realm of home VTR users. The rule articulated below will prevent *any* intrinsic use from comprising a fair use under Section 107. Moreover, the principle that an application of the first criterion of Section 107 can preclude a finding of fair use invites subsequent decisions to the effect that an application of any one of the remaining three criteria is sufficient to foreclose a finding of fair use. Such ramifications would constrict beyond recognition the present fair use doctrine, under which the rejection of a fair use defense must be predicated upon an application of all four criteria, and could restrict public access to information to an alarming and unnecessary extent.

3. The Rule Applied Below Discriminates Against New Technology.

The withdrawal of fair use protection that could occur, if the decision below were permitted to stand, would be particularly injurious in the area of new technology. The Ninth Circuit recognized that technological advances, "place[d] a strain on the fair use doctrine." 659 F. 2d at 971. Despite that perception the court below did not give the fair use doctrine the flexibility and breathing space to which it is entitled. To the contrary, the Ninth Circuit appeared to be willing to impede technological development through an extremely narrow definition of the fair use doctrine.

Professors Latman and Gorman have observed that with the employment of new technology "the entire work is usually taken." A. LATMAN & R. GORMAN, COPYRIGHT FOR THE EIGHTIES, 484 (1981). As has been stated earlier, the decision of the Ninth Circuit set forth a two-stage approach to the fair use doctrine; it created and simultaneously exalted the "intrinsic" versus "productive" use dichotomy. New technology through which "the entire work is usually taken" will not fare well under that test. The test created by the Court of Appeals will thus thwart the development of new technology.

Moreover, the Ninth Circuit showed that it had no inclination to encourage future technological advances. For example, although the Court of Appeals must have recognized that developments such as the VTR represent great investments of capital on research and development, it directed that:

> "the district court should not be overly concerned with the prospective harm to appellees. A defendant has no right to expect a return on investment from activities which violate the copyright laws. Once a determination has been made that an infringement is involved, the continued profitability of appellees' businesses is of secondary concern." 659 F. 2d at 976.

4. The Absence of Precedent Must Not Weigh Against a Conclusion of Fair Use Where New Technological Uses Are Concerned.

A central purpose of Section 107 is to apply the same expansive approach to fair use protection of uses enabled by technological advances as applied to uses known when the statute was enacted. Permitting the absence of precedent to weigh against a conclusion of fair use in evaluating new technological uses is, therefore, antithetical to the

statute's purpose and intent. This unwarranted application of absence of precedent discriminates unfairly against new technological uses and will inhibit technological development under the guise of *stare decisis*.

The principle of *stare decisis* will tend to preserve an expansive approach to fair use insofar as there is further litigation involving the many uses already developed which were considered in decisions rendered during the last one hundred and forty years.[4] However, the safeguard of *stare decisis* will afford more limited protection when addressing apparently novel questions regarding the application of the fair use doctrine in the context of new technology. Thus, uses enabled by new technological devices will be particularly vulnerable to the restrictive impact of the decision below. That particularly acute danger is likely to foreshadow a discriminatory impact upon such uses. Such a discriminatory impact would frustrate a central purpose of Section 107, the provision of an equal quantum of protection to uses enabled by technological advances. As the legislative history of Section 107 states: "[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976).

As if to prove this point, the Ninth Circuit weighed the purposed dearth of precedent regarding the relevance of intrinsic use to the issue of fair use and the purported distinctions between available precedent and the case before it in favor of its conclusion that the intrinsic use enabled by VTRs was not fair. *E.g.*, 659 F. 2d at 970. As stated in Section III.A.3, *supra*, the Congress that enacted 17 U. S. C. § 107 (1976) intended the fair use doctrine to

4. The origin of the fair use doctrine has been traced to *Folsom v. Marsh*, 9 Fed. Cas. 342, 348, No. 4,901 (C. C. D. Mass. 1841). A. LATMAN & R. GORMAN, COPYRIGHT FOR THE EIGHTIES, 460 (1981).

accommodate uses enabled by technological advances: "[F]air use is a flexible tool which Congress specifically intended to handle new technologies." Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 STAN. L. REV. 243, 254 (1979). The unavailability of precedent considering the fairness of uses enabled by previously undeveloped technology should not be deemed relevant to the issue whether such uses are fair.

If the absence of precedent is permitted to be weighed against a fair use defense where the new technological advances enable the use under consideration, the proponents of such uses, which were by definition undeveloped when prior cases were decided, would suffer an inherent disadvantage in maintaining a fair use defense. Such a discriminatory impact is manifestly arbitrary and at odds with the intent of the drafters of Section 107 to place new technological uses on an equal footing with more traditional uses in a fair use context: "The fluidity built into [Section 107] was designed to diminish the difficulty which arises when an innovation in technology makes possible new techniques of display that could not be contemplated by legislators in the year the statute was framed." *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 880 (S. D. Fla. 1978), *aff'd*, 626 F. 2d 1171 (5th Cir. 1980).[5] A mode of analysis that would operate to discriminate against new technology in a fair use context could have a stifling effect upon progress in that field.

IV. CONCLUSION

The Court of Appeals for the Ninth Circuit, in holding that the home use of VTRs for recording, for private

5. The decision of the Court of Appeals in *Triangle* is discussed in Section III.A.1.a., *supra*.

noncommercial purposes, programs broadcast free of charge, did not constitute a fair use, seriously misapplied the fair use doctrine. The application of that doctrine made by the Court of Appeals would inhibit the development of technologically new products. It would thwart innovation. This honorable Court should prevent that loss. It should accord the fair use doctrine the flexible, equitable role for which it was intended. The decision of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

PETER F. MARVIN
(Counsel of Record)
CHRISTIAN H. MILLER
FREDERIC M. KRIEGER
MILLER SCHREIBER & SLOAN
1529 Walnut Street
Philadelphia, PA 19102
(215) 567-4900

Attorneys for Viare Publishing, Amicus Curiae

Amicus Brief

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

SONY CORPORATION OF AMERICA, *et al.*,
Petitioners,

v.

UNIVERSAL CITY STUDIOS, INC. AND WALT DISNEY PRODUCTIONS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* VIRGINIA CITIZENS' CONSUMER COUNCIL, INC., ARIZONA CONSUMER COUNCIL, IDAHO CONSUMER AFFAIRS, INC., ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC., NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP, MINNESOTA PUBLIC INTEREST RESEARCH GROUP, CONSUMERS LEAGUE OF OHIO, OAKLAND ALAMEDA COUNTY CONSUMER COUNCIL, RHODE ISLAND CONSUMER COUNCIL, THE CENTER FOR CONSUMER AFFAIRS, THE UNITED STATES CONSUMER ASSOCIATION, CONCERNED CONSUMERS LEAGUE, INC., EDWARD GREENSFELDER, JR., WILLIAM C. MCLAUGHLIN, ROBERT MCEWEN AND JUDY BRAIMAN-LIPSON ON BEHALF OF VIDEO CASSETTE RECORDER OWNERS AND USERS IN SUPPORT OF REVERSAL

WILLIAM A. DOBROVIR
(Counsel of Record)
FRED C. ZACHARIAS
Dobrovir, Oakes & Gebhardt
1025 Vermont Ave., N.W.
Suite 1105
Washington, D.C. 20005
(202) 347-8118
Attorneys for *Amici Curiae*

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BRIEF OF *AMICI CURIAE* VIRGINIA CITIZENS' CONSUMER COUNCIL, INC., *ET AL.*, ON BEHALF OF VIDEO CASSETTE RECORDER OWNERS AND USERS IN SUPPORT OF REVERSAL

Amici curiae, individuals and nonprofit organizations representing present and future video cassette recorder (VCR) owners and users urge the Court to reverse the Ninth Circuit's decision. This brief is filed with the written consent of all parties, on file with the Clerk.

INTEREST OF AMICI

The Virginia Citizens Consumer Council, Inc. (VCCC), Arizona Consumer Council (ACC), Idaho Consumer Affairs, Inc. (ICA), Association of Massachusetts Consumers, Inc., North Carolina Public Interest Research Group, Minnesota Public Interest Research Group and Consumers League of Ohio are nonprofit, non-partisan, voluntary statewide associations of citizens which advocate and represent the interests of American consumers before courts, legislatures, and administrative agencies and educate the public on consumers' rights. They have active memberships of 560, 1500, 200, 200, 7,000, 40,000, and 350 (175 regular, 175 institutional), respectively. VCCC represented consumer interests in the landmark case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). ICA is an affiliate of the Consumer Federation of America which, with 30 million members, is the largest national consumer membership organization in the United States.

Oakland Alameda County Consumer Council (OACCC) and Rhode Island Consumer Council (RICC) are government chartered and funded nonprofit organizations. OACCC serves the 1.1-million residents of Alameda County, CA, with consumer education, complaint assistance and coordination with local business and federal, state and local government agencies. RICC was created in 1966 to advocate the interests of Rhode Island's 950,000 citizens on consumer issues, promote consumer education and represent consumers with respect to state and federal regulation and legislation. The Center for Consumer Affairs is incorporated "to advocate legislative reforms in con-

sumer affairs, litigate where appropriate in the public interest, to educate the public generally about consumer matters to make them more effective in the marketplace . . ." in the State of Alabama. The United States Consumer Association has 50,000 members. Its newsletter *Wise Consumer* informs the public about issues of concern to consumers, its Consumer Protection Bureau acts as an advocate for consumers on issues with dealers, distributors and manufacturers of consumer products and its buyer referral and other services enable its members to purchase consumer products, including VCR's, on favorable terms. Concerned Consumers League, Inc., is a United Way funded consumer education and protection organization that provides services to consumer populations throughout the Milwaukee, WI, metropolitan area.

Edward Greensfelder, Jr., William C. McLaughlin, Robert McEwen and Judy Braiman-Lipson are residents of Washington, D.C., Western Springs, IL, Boston, MA and Rochester, NY, respectively. Greensfelder and McLaughlin are VCR owners; Greensfelder uses his both in his law practice (e.g., for showing videotapes of surgical operations in preparing for and conducting litigation) and at home, in taping programs for later viewing by himself and his family. McLaughlin uses his VCR for home use exclusively, taping programs for later one-time viewing by himself and his family; he does not keep any program recorded for more than a few days, consistently erasing and reusing his cassettes. McEwen and Braiman-Lipson have used VCR's owned by others and are potential purchasers. All four are consumers and citizens of the United States and oppose the Ninth Circuit's restriction of their right to purchase and use Video Cassette Recorders (VCR's).[1]

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[1]VCC, ACC, AMC and RICC as organizations and McEwen as an individual, with others, have organized the Consumer Recording Rights Committee, as an affiliate of the Home Recording Rights Coalition (HRRC). HRRC is a coalition of VCR and tape owners, users, manufacturers, dealers and distributors and organizations and associations representing them; it has sponsored the preparation and filing of this brief by the amici named in the title.

Each of the amici has a strong interest in the outcome of this litigation. They, their members and those they represent own, use or intend to own or use VCR's in the various ways described in this brief. The Ninth Circuit's decision declared such ownership and use unlawful under the copyright laws, gravely affecting the rights of existing and future owners and users of VCR's.

SUMMARY OF ARGUMENT

1.

The Copyright Act, like all other federal statutes, is limited by the First Amendment. The First Amendment rights of free speech protect the right to receive communication of facts, ideas, concepts and emotions. This right of the audience is especially important to issues involving broadcasting; the VCR is no more than a convenient adjunct to the audience's receipt of broadcasting. Here the Ninth Circuit labeled as copyright infringement individuals' use of VCR's at home to receive and enjoy broadcasting without any commercial exploitation whatever. This kind of VCR use is a First Amendment protected right and cannot constitutionally be penalized under the label "copyright infringement."

2.

The Ninth Circuit construed the Copyright Act to render *any* use of a VCR altogether unlawful. This construction sweeps within its ban many VCR uses that do not infringe the copyright of an unwilling author. The Ninth Circuit's decision therefore sweeps too broadly, penalizing First Amendment protected conduct that is altogether beyond even the arguable scope of the Copyright Act, and cannot be sustained.

3.

Respondents excluded VCR owners and users, the alleged primary infringers here, from this lawsuit by collusively joining a friendly owner-user as a nominal defendant. Thus vital rights went unrepresented. This case should not have been allowed to go forward without real representation of VCR users' interests.

4.

The Ninth Circuit suggested as one form of relief for the alleged infringement that the District Court set itself up as an ad-hoc royalty tribunal. The District Court would establish a continuing "tax" on VCR sales (ultimately to be borne by consumers, of course) and then from time to time distribute the proceeds to respondents (and presumably other authors). This would take the District Court into the middle of a legislative and regulatory thicket far beyond the scope of a federal court's powers under Article III, and impose on it tasks far beyond a court's capacity to administer.

STATEMENT OF THE CASE

Amici adopt petitioners' statement of the case. We supplement or refer in the body of the argument to facts pertinent to our argument.

ARGUMENT

I. The VCR Uses At Issue In This Case Are Protected by the First Amendment, Which Immunizes Them From Penalty or Prohibition Pursuant to The Copyright Laws

The Court has yet to resolve the conflict between the property claims of copyright holders and the First Amendment protected interests of the public in receipt and availability of the facts, ideas and concepts which are the raw material of speech and communication.[2] This conflict has sharpened with the proliferation of technological advances that permit copying and hence convenient re-use by continued access to copies of printed and electronic publications. The Court passed the conflict by in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided court*, 420 U.S. 376 (1975), which established the public's right to photocopy copyrighted,

[2] *See*, however, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 577 n.13 (1977).

printed publications for use and reuse. For sound recordings, Congress seems to have resolved the conflict against the copyright holder and in favor of the public. 17 U.S.C. § 114(b) (1976); H. REP. No. 487, 92d Cong., 1st Sess. 7 (1971), *reprinted in* [1971] U.S. Code Cong. & Adm. News 1566, 1572; Pet. App. B 59-64. This case poses the conflict for home recording of television broadcasts.

Here the respondents claim that an individual's recording of a television broadcast produced by them, in his own home for private use and re-use without sale or other commercial exploitation, infringes their copyright. They claim that they may restrain such recording in the future and collect punitive statutory damages for each such act in the past. *See* Pet. App. A 28-29. VCR owner and user *amici* submit that the Ninth Circuit's decision accepting respondents' claims cannot stand in the face of their First Amendment rights and those of the public at large – rights to receive, enjoy, discuss, communicate and otherwise benefit from the *content* of the whole range of television broadcasting, including respondents' productions.

A. The Right to Receive Speech

1.

Time and again this Court has reaffirmed the First Amendment's guarantee not only of the right of the speaker to speak but of the right of the potential audience, the public, to hear: to have unfettered "access to . . . the dissemination of information and ideas." *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, ___ U.S. ___, ___, 102 S. Ct. 2799, 2808 (1982), *quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). The First Amendment prevents the "[contraction of] the spectrum of available knowledge," *id., quoting Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). "[T]he Constitution protects the right to receive information and ideas," *id., quoting Stanley v. Georgia*, 394 U.S. 557, 564 (1969) – because "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press and political freedom." *Id.* (emphasis in original).

2.

There is no qualification of the kind of communication whose receipt the First Amendment protects. Its mantle covers equally all the fare broadcast on television, from the sublime to the banal: news, drama, music, entertainment, commercials. It forbids any limitation on "the stock of information from which members of the public may draw," *First National Bank of Boston v. Bellotti,* 435 U.S. at 783. "A commercial advertisement", for example, "is constitutionally protected . . . because it furthers the societal interest in the 'free flow of commercial information.' " *Id., quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 764 (1976). The protection of the "community right to hear . . . extends to artistic as well as political expression," Goldstein, *Copyright and the First Amendment,* 70 COL. L. REV. 983, 989 (1970), *citing Curtis Publishing Co. v. Butts,* 388 U.S. 130, 147 (1967) and *Time, Inc. v. Hill,* 385 U.S. 374, 388 (1967). The First Amendment draws no "line between the informing and the entertaining," *Winters v. New York,* 333 U.S. 507, 510 (1948). It applies to "information and ideas, regardless of their social worth," *Stanley v. Georgia,* 394 U.S. at 564, citing *Winters,* 333 U.S. 507 (1948). The receipt even of communication that presents neither "ideas" nor "truth, science, morality [or] arts" is protected, *Virginia State Board of Pharmacy,* 425 U.S. at 762, *quoting Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942) and *Roth v. United States,* 354 U.S. 476, 484 (1957).

3.

The First Amendment is more than a means to promote desirable national or societal goals.[3] As Mr. Justice Brandeis wrote more than a half century ago:

> Those who won our independence believed that *the final end of the state was to make men free to develop*

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[3] *E.g.*, the political process, CBS, Inc. v. FCC, 453 U.S. 367, 395-96 (1981), Mills v. Ala., 384 U.S. 214, 218 (1966), Grosjean v. American Press Co., 297 U.S. 233, 250 (1936), informed economic choice, *Va. State Bd. of Pharmacy,* 425 U.S. at 763-64, Thomas v. Collins, 323 U.S. 516, 534 (1945), the flow of commerce, *see* Linmark Assoc[s], Inc. v. Township of Willingboro, 431 U.S. 85, 92 (1977).

> *their faculties,* and that in its government the deliberative forces should prevail over the arbitrary. *They valued liberty* both *as an end* and as a means. *They believed liberty to be the secret of happiness and courage to be the secret of liberty.*

Whitney v. California, 274 U.S. 357, 375 (1927) (dissenting opinion) (emphasis added). Thus, the Amendment is an "end in itself — essential to individual dignity and self-fulfillment," Note, *Copyright Infringement and the First Amendment,* 79 COL. L. REV. 320, 324 (1979), *citing Cohen v. California,* 403 U.S. 15, 24 (1971);[4] *see* Note, *The First Amendment Exception to Copyright: A Proposed Test,* 1977 WISC. L. REV 1158, 1181 (1977); Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press,* 17 *U.C.L.A. Rev.* 1180, 1183 (1970).

In providing this untrammeled right to receive communication the First Amendment promotes personal values whose pursuit is a precious, cherished privilege of life in a free society. These include the quest for satisfaction in religious life, *Marsh v. Alabama,* 326 U.S. 501, 508-09 (1946), *Martin v. Struthers,* 319 U.S.141, 143 (1943); the emotional bond between husband and wife or friend and friend, even if one of them is in prison, *Procunier v. Martinez,* 416 U.S. 396,408-09 (1974); scholarly inquiry into truth, *Kleindienst v. Mandel,* 408 U.S. 753, 762-65 (1972), *see Griswold v. Connecticut,* 381 U.S. at 482; the thrill of youth in exploring the whole intellectual world of books, *Board of Education, Island Trees,* ____ U.S. at ____, 102 S.Ct. at 2808-09; the fulfillment of the marriage vows in a couple's own way, *Griswold v. Connecticut,* 381 U.S. at 485-86. In sum, no matter what the content of a communication — save one subject to penalty *on the speaker* as gravely dangerous to society, e.g., *New York v. Ferber,* ____ U.S. ____, 50 U.S.L.W. 5077 (June 29, 1982) (obscene abuse of children), *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942) (fighting words), the Constitution protects an individual's "right to satisfy his intellectual

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[4]Where the Court noted as a basis for this First Amendment privilege, "the premise of individual dignity and choice upon which our political system rests," citing Justice Brandeis' dissent in *Whitney.*

and emotional needs in the privacy of his own home." *Stanley v. Georgia,* 394 U.S. at 565, 568.

4.

The First Amendment protects receipt of information and ideas no matter what the medium: pamphlets distributed door-to-door, *Martin v. Struthers,* 319 U.S. at 143-44, or in the streets, *Marsh v. Alabama,* 326 U.S. at 503; letters from incarcerated prisoners, *Procunier v. Martinez,* 416 U.S. at 408-09 ("[c]ommunication by letter . . . is effected only when the letter is read by the addressee"), or letters constituting "communist political propaganda," *Lamont v. Postmaster General,* 381 U.S. 301, 307 (majority), 308 (Brennan, J., concurring: "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them") (1965); face to face discussion, *Kleindienst v. Mandel,* 408 U.S. at 762-65; formal addresses to an assemblage, *Thomas v. Collins,* 323 U.S. at 534; newspapers, *Mills v. Alabama,* 384 U.S. at 218, *Grosjean v. American Press Co.,* 297 U.S. at 250 (tax on newspaper measured by circulation unconstitutional; "it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees"), cited in *Houchins v. KQED, Inc.,* 438 U.S. 1, 8-9 (1978) (plurality opinion); libraries and their books, *Board of Education, Island Trees,* ____ U.S. at ____, 102 S. Ct. at 2807-2810, and *see* cases cited at *id.* and dissenting opinions cited at ____ U.S. at ____ n.20, 102 S. Ct. at 2808 n.20; films, *Stanley v. Georgia,* 394 U.S. at 558; and broadcasting, *CBS, Inc. v. FCC,* 453 U.S. at 395-96; *CBS, Inc. v. Democratic National Committee,* 412 U.S. 94, 101-02, 112-113, 123 (1973); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969).

5.

The importance of the right to receive, to hear, reaches its apogee with broadcasting. In the oft quoted words of the Court in *Red Lion,* 395 U.S. at 390 (emphasis added),

> . . . the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and pur-

> poses of the First Amendment. *It is the right of viewers and listeners, not the right of the broadcasters, which is paramount* . . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government in itself or a private licensee . . . . *It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.* That right may not constitutionally be abridged either by Congress or by the FCC.

In *CBS, Inc. v. Democratic National Committee,* the Court followed *Red Lion* to recognize "an unusual order of First Amendment values" for broadcasting, 412 U.S. at 101. At the top of the order is "the right of the public to be informed," 412 U.S. at 112-13, *quoting* Report of Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949). Not only are the rights of the viewers and listeners paramount, 412 U.S. at 102, "the interest of the public is [the Court's] foremost concern" — that is, "the public interest in providing access to the marketplace of 'ideas and experiences' ", 412 U.S. at 122, 123 (emphasis added).[5] Just last term, the Court again reiterated the principle that freedom of expression is promoted by "enhancing the ability of . . . the public to receive, information . . . ." *CBS, Inc. v. FCC,* 453 U.S. at 396, *quoting Red Lion, supra.*

B. Copyright Is Limited by The First Amendment

Just as the First Amendment limits the reach of the law of libel in order to protect the public's interest in the free flow of information and wide open debate of public issues, *see New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and its progeny, the First Amendment similarly limits the reach of the copyright holder's monopoloy. The courts created the Fair Use

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[5] In *CBS, Inc. v. Democratic National Committee,* the Court declined to hold that the public interest in receipt of information was served by opening the airwaves to purchase by the affluent. 412 U.S. at 123.

doctrine, *see* Pet. App. A 13, as one First Amendment-based limitation on the monopoly, *see Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306-07, 309, 311 (2d Cir. 1966), *cert. denied*,385 U.S. 1009 (1967),[6] and Congress followed. 17 U.S.C.§ 107 (1976).

The courts also made it clear that the First Amendment forbids any copyright monopoly of the ideas or facts in a publication; copyright protects only the manner of expression. *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Lee v. Runge*, 404 U.S. 887, 892-93 (1971) (Douglas, J., dissenting from denial of certiorari); *Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.*, 621 F.2d 57,61 (2d Cir. 1980); *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170-71 (9th Cir. 1977); *Wainwright Securities, Inc. v. Wall Street Transcript Corporation*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Rosemont*, 366 F.2d at 306; *United States v. Bodin*, 375 F. Supp. 1265, 1267-68 (W.D. Okla. 1974); *Robert Stigwood Group Limited v. O'Reilly*, 346 F. Supp. 376, 383 (D. Conn. 1972) (no copyright in events of Jesus' life or in Biblical narration), *rev'd on other grounds*, 530 F.2d 1096 (2d Cir.), *cert. denied*, 429 U.S. 848 (1976); *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (no copyright in the news; Kennedy assassination); *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921, 923 (S.D. Cal. 1963) (no copyright in facts of the life of historical person).

In the words of Justice Brandeis, copyright does not protect "the knowledge, truths, ideas, or emotions" expressed, but only "the form or sequence in which they are expressed." *Interna-*

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[6] *Rosemont* was decided in a unanimous opinion written by Judge Lumbard for the three judge panel. Judges Lumbard and Hays also filed a concurring opinion, which made the First Amendment basis of Fair Use more explicit:

> The spirit of the First Amendment applies to the copyright laws at least to the extent that *the courts should not tolerate any attempted interference with the public's right to be informed*. . . .

366 F.2d at 311 (emphasis added).

tional News Service v. Associated Press, 248 U.S. 215, 254 (1918) (dissenting opinion). Congress also has incorporated this principle in the statute. 17 U.S.C. § 102(b) (1976).

C. The First Amendment Immunizes VCR Home Recording, the Only Use at Issue in This Case, From the Reach of the Copyright Law

1.

This case does not involve and *amici* do not defend the use of VCR's to produce copies of TV programs for commercial use and profit by rent or sale. Respondents' target here is the use of VCR's in the home, by individual purchasers (ultimate consumers), to record programs for later viewing at a time more convenient for the owner and his family ("time-shifting"). *See* Pet. App. B 43, 436, 47-48, 81-82, 108-12.[7]

The asserted liability as infringers of the petitioners, who are manufacturers, distributors and retailers of VCR's, stands or falls with the liability *vel non* of the consumers whose interests *amici* represent. It is derivative.[8] Respondents do, however, seek relief that would directly harm present owners of VCR's –

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[7]The Ninth Circuit posed this issue:

> Does off-the-air copying of copyrighted audiovisual materials by owners of a videotape recorder in their homes for private noncommercial use constitute an infringement?

Pet. App. A 3. The District Court described respondents' "main contentions" as being that the use by the one individual defendant of "his Betamax in his home to copy plaintiffs' broadcast material for his own home use," and similar use by "other individuals infringed their copyrights." Pet. App. B 33.

[8]Respondents seek to hold petitioners liable for having "furnished the instrumentality" used to infringe (i.e., the VCR) (called "direct infringement"); for having encouraged consumers' use of VCR to infringe (called "contributory infringement"), and on a theory of *respondeat superior* based on a notion that consumers who use their VCR's to tape TV programs are petitioners' "agents" (called "vicarious liability"). Pet. App. B 89-101. The District Court rejected all three theories, *id.;* the Ninth Circuit accepted the "contributory infringement" argument, Pet. App. A 25-27.

a "recall" of VCR's already in consumers' homes, as well as a prohibition against future VCR sales, which would prevent would-be owners from having the benefit of this new technology. Pet. App. B, 114-15. The Ninth Circuit added the possibility of levying statutory changes on VCR owners under 17 U.S.C. § 504(c)(1): a minimum fine of $250 for every TV program copied. *See* Pet. App. A 28.

To enforce the copyright laws against VCR owners, to seize VCR's already purchased and in use in three million homes, to prevent others (potentially 30 million others) from owning VCR's, and to fine present owners for past use of VCR's, would conflict squarely with consumers' First Amendment rights to receive ideas, concepts, news, entertainment: "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences," *Red Lion,* 395 U.S. at 390. For all the VCR device does (insofar as this case is concerned) is to serve an additional means to receive, watch, listen to, enjoy and learn from TV programming. It makes it possible to record a program when the owner or a family member is not at home, for viewing and listening when the owner or family is at home, perhaps to share with guests in the home at a time convenient for social viewing.[9] As such, and like cable TV, the VCR "no more than enhances the viewer's capacity to receive the broadcaster's signals," *Fortnightly Corp. v. United Artists Television, Inc.,* 392 U.S. 390,399 (1968) (footnotes omitted). The "basic function [it] serves is little different from that served by the equipment generally furnished by a television viewer," *id.,* i.e., his TV receiving set.[10]

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[9]Respondents also fear "librarying," i.e., the repeat viewing of the same tape. To the extent this occurs (of which the District Court had doubt, Pet. App. B 112), it remains receipt of ideas protected by the First Amendment – just like the re-reading of a favorite book. And to the extent that recorded programs are viewed with guests, the guests' right to receive ideas similarly is entitled to protection – as with the loan of a book or the gift of a magazine or newspaper after reading it oneself.

[10]The Court has been loath to extend the reach of the copyright holder's monopoly to cover new technological advances, preferring to leave this to the Congress. *See* Goldstein v. California, 412 U.S.

In so attempting to use copyright "to control subsequent public access" to broadcasts, respondents would exercise something akin to a "power of censorship contrary to all traditions of the first amendment." Patterson, *Private Copyright and Public Communication: Free Speech Endangered,* 28 VAND. L. REV. 1161, 1207 (1975). They seek to restrain, or penalize "reasonable use of the work by the public." *Id.* at 1210. In seeking statutory fines, respondents want to use the copyright law "to create, rather than to protect, profit." *Id.* In so doing, they scoff at the principle that copyright is "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public." *Id.* at 1168, n.26, *quoting* H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1907).[11]

546, 565-66 (1973), discussing White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908), in which the Court declined to extend the copyright in a musical composition to cover player piano rolls – "merely component parts of a machine which executed the composition," *Goldstein* at 565. And *see id.* at 578-79 (dissenting opinion) ("whenever technological advances made extension of copyright protection seem wise, Congress has acted promptly . . . . Congress has decided that free competition should be the general rule, until it is convinced that the failure to provide copyright or patent protection is hindering 'The Progress of Science and useful Arts' ").

As the Court noted in Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975), application of the copyright laws to new technology must take account of copyright's basic purpose, to secure to the *public* the "general benefits . . . from the labors of authors," *quoting* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

[11]The Ninth Circuit's rationale fails because it calls unlawful and would penalize VCR owners' and users' exercise of personal First Amendment rights. Not at issue is whether or to what extent Congress may, through carefully crafted commerce clause litigation, regulate or tax the production or sale of VCR machinery that permits consumers to exercise their constituitonal right to receive information and artistic expression. *See* pp. 26-29 *infra. Cf.* Grosjean v. American Press Co., 297 U.S. at 250, p. 8 *supra.*

Thus this case squarely raises First Amendment rights of individual members of the public in a noncommercial setting. VCR owners make use of this technological advance to record copyrighted material for the sole purpose of enhancing their ability to receive the factual or esthetic content of the copyrighted works. The Ninth Circuit brushed aside these First Amendment rights of VCR "users to increase the access to copyrighted materials" in a sentence, holding them "wholly without merit," Pet. App. A 19, citing three cases in which commercial appropriation of copyrighted material for profit was held unprotected by the First Amendment, *id.* 19-20.[12] The Ninth Circuit failed altogether to recognize the differences between the commercial exploitation involved in those cases (and other decisions similarly refusing to minimize commercial copyright privacy of First Amendment grounds.).[13] But this case does not involve a profit-seeking defendant who "broadcast[s] a copyrighted dramatic work without liability to the copyright owner," or "a prize fight . . . or a baseball game . . . ." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 575.

At the same time, the Ninth Circuit ignored decisions recognizing the applicability of the First Amendment where the

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[12]The cases were Dallas Cowboys Cheerleaders v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979) (defendants' publication of sale of a poster depicting scantily clad cheerleaders in uniform copying plaintiff's similar poster held not entitled to First Amendment protection); Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) (appropriation of cartoon characters in defendants' comic books sold for profit), and Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., p. 11 *supra* (defendant hamburger chain appropriated plaintiffs' cartoon characters for defendant's TV commercial).

[13]*See, e.g.*, Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d at 97 (appropriation of copyrighted research reports in defendant's weekly newspaper held "chiseling or personal profit"); United States v. Bodin, 375 F. Supp. at 1267-68 (record piracy); Robert Stigwood Group Limited v. O'Reilly, 346 F. Supp. at 381-84 (appropriation of plaintiffs' music lyrics for defendants' performances which netted $220,000); McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F. Supp. 415, 422 (S.D.N.Y. 1971) (competing college textbooks).

public's receipt of information, ideas and esthetic experience was implicated; *Rosemont Enterprises,* 366 F.2d at 311 ("[t]he spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed . . .") (concurring opinion of Lumbard, J., for himself and one other judge of three-judge panel); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.,* 445 F. Supp. 875, 881-84 (S.D. Fla. 1978) ("[w]hen the Copyright Act and the First Amendment . . . operate at cross-purposes, the primacy of the First Amendment mandates that the Copyright Act be deprived of effectuation"), *aff'd on other grounds,* 626 F.2d 1171, 1178 (5th Cir. 1980); *see* concurring opinion of Tate, J., 626 F.2d at 1184 ("a First Amendment privilege may, and *should* exist where utilization of the copyrighted expression is necessary for the purpose of conveying thoughts or expressions.") (emphasis in original; First Amendment would immunize publication if Fair Use did not); *Keep Thomson Governor Committee v. Citizens for Gallen Committee,* 457 F. Supp. 957, 960 (D.N.H. 1978) ("the exclusive right of a copyright holder must be weighed against the public's interest in dissemination of information . . . .").

3.

Here the asserted infringement, home video recording, is not commercial exploitation of the work of another for profit, *see Zacchini,* 433 U.S.at 580 (Powell, J., dissenting); *see also* Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression,* 67 CAL. L. REV. 283, 308, 310 (1979). To hold home use of a VCR to be an infringement places a direct restraint on the viewer's "use" and receipt of the "idea or concept" of the TV program he wishes to record, *Goldstein,* 412 U.S. at 571.[14] "When the objectives of free speech require access to the expression of another, the property interest created by copyright law must yield, regardless of the economic impact. Abridgements of the right of free speech

[14]Unlike the recordings involved in *Goldstein,* the TV program, once broadcast, if missed and not recorded for later viewing, is lost permanently to that viewer unless rebroadcast.

do not become tolerable because they spring from the exercise of the copyright power . . . ." Denicola, 67 CAL. L. REV. at 303. Copyright is a monopoly granted by the Congress and its holder is "in a quasi-governmental position." Goldstein, *Copyright and The First Amendment,* 70 COL. L. REV. 983, 987 (1970). To allow the copyright holder, as in this case, to decide for the viewer the timing of the viewer's receipt of the content of the product, is tantamount to "governmental action violative of the First Amendment." *Id.*

To quote Justice Brandeis, "the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use." *International News Service v. Associated Press,* 248 U.S. 215, 250 (1918) (dissenting opinion), *quoted* in *Goldstein v. California,* 412 U.S. at 570. Here, however, respondents seek to pluck back what they have made "free as the air." They seek to restrain the time, place and manner in which members of the public make "common use" of television broadcasts.

If respondents prevail, they will have limited "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences," *Red Lion,* 395 U.S. at 390, *quoted in CBS,* 412 U.S. at 102. They will have hindered the use of a new technology to provide and enhance "suitable access" to the "knowledge, truths, ideas [and] emotions," *International News Service,* 248 U.S. at 254 (Brandeis, J., dissenting), in television broadcasts. They will have attenuated the people's "interest in free speech by [broadcasting] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment," *Red Lion, supra.* They will have put hobbles on the "most efficient and effective 'marketplace of ideas' ever devised," *CBS,* 412 U.S. at 195 (Brennan, J., dissenting), the medium that is now for the public a "prime source" of information. *Id., quoting Red Lion,* 395 U.S. at 386 n.15.

Finally, respondents will have succeeded in intruding into the sacred precincts of an individual's home. First Amendment rights are not divorced from the environment in which their protection is invoked. Thus the interests of the school environment,

Board of Education, Island Trees, ____ U.S. at ____, 102 S. Ct. at 2808-09, *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 506 (1969), or the prison environment, *Procunier v. Martinez,* 416 U.S. at 412-13, weigh against First Amendment rights where they clash. In the same way and in the contrary direction, the home environment nourishes and adds strength to First Amendment guarantees of expression and receipt of expression within the home's four walls, *Stanley v. Georgia,* 394 U.S. at 565-66.[15]

II. The Ninth Circuit's Construction of the Fair Use Section of the Copyright Statute In This Case Would Render The Statute Unconstitutionally Overbroad

The Ninth Circuit held that use of VCR's to record television programming in the home for later family viewing was not protected by the Fair Use doctrine, 17 U.S.C. § 107. Pet App. A 12-25. Departing from the plain language of § 107, the court held that fair use protected only a second use by an author, for republication, of a first author's work. *Id.* 14-18. It rejected the holding of the Court of Claims in *Williams & Wilkins Co.* that photocopying of printed material for "intrinsic use," i.e.,

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[15]The fact that individuals' homes are the places where asserted infringement is perpetrated bears on another of respondent's arguments. They claim injury from potential use of the VCR to avoid commercials, Pet. App. B 107, 113. If this were to occur, it would be an exercise of the viewer's First Amendment right *not* to hear what he considers offensive or undesirable. It makes the individual viewer less "captive," able finally to do something about the possibly "resent[ed] . . . invasion of his [television] set," *see* CBS, Inc. v. Democratic National Committee, 412 U.S. at 128, *citing* Public Utilities Comm'n v. Pollak, 343 U.S. 813, 463 (1952), and *quoting Hearings before the Senate Committee on Interstate Commerce on Radio Control,* 69th Cong., 1st Sess. 54 (1926) (remarks of Secretary of Commerce Hoover). While one may have no judicial remedy to prevent aural intrusion, *Pollak, supra,* surely respondents cannot invoke the copyright law to enforce it; *see Pollak,* 343 U.S. at 466-69 (dissenting opinions of Black and Douglas, JJ.). As Mr. Justice Douglas there pointed out, "[o]ne who tunes in on an offensive program at home can turn it off . . . ." 343 U.S. at 469.

for personal use by the copier, is protected fair use. The Ninth Circuit thus seems to propose an absolute rule of law: any copying for "intrinsic use" is infringement.

On its road to this conclusion the Ninth Circuit kicked inconvenient obstacles aside. It declared VCR use to be without substantial societal benefit, asserting that VCR's were used only for the "copying of entertainment works for convenience." Pet. App. A 19; *see id.* 27. It expressly disregarded information uses. *Id.* 20. It stated its holding in a fallacy:

> Videotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Virtually all television programming is copyrighted material. Therefore, videotape recorders are not "suitable for substantial noninfringing use."

Pet. App. A 25-26 (footnote and citation omitted). The Ninth Circuit thus airily assumed away the many uses of VCRs that do not involve copying of respondents' productions: news, public affairs and educational programming, broadcast and potentially recorded off-the-air; noncopyrighted programming, and nonbroadcast uses: matters that the District Court carefully considered, *see* Pet. App. B 106-07.

To hold that manufacture, sale, distribution, ownership and use of VCR's is wholesale infringement, while disregarding VCR uses other than recording of *respondents'* copyrighted films, unconstitutionally penalizes protected speech. The Ninth Circuit's construction of the copyright statute deters not only the assertedly infringing home recording of respondents' productions, but the numerous uses of VCR's that do not even remotely or arguably infringe. It "sweeps within its prohibitions what may not be punished under the First" Amendment, *Grayned v. City of Rockford,* 408 U.S. 104, 114-15 (1972), and chills protected speech. *See Bates v. State Bar of Arizona,* 433 U.S. 350, 380 (1977). Such a construction of the copyright statute must be struck down as overly broad. *See id.; see also Bigelow v. Virginia,* 421 U.S. 809, 817 (1975); *Lewis v. City of New Orleans,* 415 U.S. 130, 131-32 (1974); *United States Civil Service Commission v. National Ass'n of Letter Carriers,* 413 U.S. 548, 580 (1973); *Zwickler v. Koota,* 389 U.S. 241, 249-50 (1967).

No matter how the Ninth Circuit deems such protected, noninfringing uses "hypothetical," *see Bigelow v. Virginia,* 421 U.S. at 817, they cannot be so easily disregarded. *Id.*

Broadcast Uses

A glance at the TV programming available in the Washington, D.C. TV market during a typical week in March 1982 (Appendix A) shows that significant informational, educational, scientific and cultural programs abound, whose copying even the Ninth Circuit could not deny benefits society and fits within the "non-profit educational" purposes of criticism, comment, teaching, scholarship, and research protected by the fair use doctrine, 17 U.S.C. § 107, and the First Amendment interests set out above.

News and Public Affairs Programming. Besides regular news broadcasts, TV public affairs programming includes interview programs, panel discussions on current events and special documentaries. During the sample week broadcasters offered 51 public affairs broadcasts, including highly respected journalistic series like "The MacNeil/Lehrer Report," "This Week With David Brinkley" and "60 Minutes." Special broadcasts ranged in topics from crime to American assessments of Soviet military strength.

Important news events (e.g. Presidential speeches and press conferences) often are broadcast during working hours, as is live coverage of daytime local and national legislative proceedings. VCR's permit working consumers to record and view such programming, enhancing voter knowledge and understanding of public affairs.

Scientific Programming. TV is particularly well suited to the presentation of scientific concepts to the layman. The sample week presented six special broadcasts on scientific and environmental topics, including two National Geographic programs, a commemoration of the centennial of Einstein's birth, four programs on health and episodes of the acclaimed series "Nova" and "Life on Earth." VCR's not only enable more of the public to view such programs but make it easier for parents to share them with their children.

Children's Programming. Home recording capability gives

parents more control over what their children see. Currently only 20% of children's viewing time is spent watching children's programming. VCR's enable parents to direct their child's viewing towards educational broadcasts aimed specifically at children, like "Sesame Street."

Often programs marvelously suitable for children are broadcast in prime time viewing hours.[16] If they conflict with a program adults prefer or are broadcast after a child's bedtime, a VCR can preserve the program for the child's viewing the next afternoon.

Home recording also offers children themselves more control over what they see, with educational benefit. Dr. John C. Wright of the Center for the Influence of Television on Children has noted that with VCR's "children will be able to stop the program at any time to reflect on what they've seen or look up additional information, or replay a part they didn't understand . . . . This will offer incredible learning opportunities to those kids who don't respond to print media but learn well from images." *New York Times,* March 12, 1981, § 3, at 6, Col. 2.

Religious and Instructional Programming. The sample week included 22 religious programs. The VCR promotes the producer's goal to communicate his message widely. The sample week included broadcasts teaching woodworking, oil painting, home repair, cooking, small business management and exercise. About 500 colleges nationwide broadcast courses for credit.

Artistic, Literary and Historical Programming. Adaptations of literary works, historical dramatizations and programs about creative artists inform and increase exposure to cultural and historical subjects. The week included Evelyn Waugh's *Brideshead Revisited,* Bronte's *Jane Eyre,* a dramatization of the life of Admiral Horatio Lord Nelson, telecasts from the Kennedy Center, the Oakland Symphony Orchestra and the "American Playhouse" series. Broadcasts on artistic or literary subjects included the work of Norman Rockwell and Carl Sandburg, pro-

[16]For example, the commercial network program "The Lion, the Witch and the Wardrobe" from C.S. Lewis' *Chronicles of Narnia* was broadcast between 8 and 9 p.m. EST.

files of playright Lillian Hellman and tenor Luciano Pavarotti and a series on the nature of creativity.

Non-copyrighted and Permitted Uses of Broadcasts

The Ninth Circuit assumed that all TV programming was copyrighted; but at least three categories of TV programming are not protected by copyright at all. *See* Petition for Certiorari at 4-5. Petitioners' brief on the merits provides considerably more detail of the record evidence showing the large quantity of material that is not copyrighted or whose copyright has been lost.

Non-broadcast Uses[17]

Production of Personal Videotapes. Many VCR owners and users use their equipment to produce, film and view their own videotapes of family events. Students may film legal arguments, speeches, debates, theatrical roles and the like, enabling them to critique and to improve their performance. Sales of portable VCR units doubled from 1980-81 and are steadily increasing. It is estimated that 80% of portable VCR purchasers will buy video-cameras.

Viewing of Prerecorded Videotapes. Sale and rental of prerecorded video cassettes and tapes is increasing, *see* Pet. App. B 112. One of respondent Universal's competitors, Twentieth Century Fox, has already released fifty motion picture cassettes or tapes for use with VCR's in the home. *Id.* Between 40% and 50% of VCR owners have purchased or rented prerecorded video programs. Prerecorded instructional cassettes are available on varying subjects, e.g., first aid, child, pet and plant care, home and automobile repair, cooking, exercise, dance, speed-

[17]Respondents have urged that one form of relief would be to prohibit the manufacture of VCR's with tuners, the electronic components permitting receipt of broadcast signals. This would still leave the construction of the statute overbroad, prohibiting non-copyright and permitted off-the-air recording.

For citations to sources for the following information *see* Brief of *Amicus Curiae* Virginia Citizens' Consumer Council, Inc., *et al.* in support of Petition for Writ of Certiorari at 12, 13, and *id.* nns. 9-11, 13.

reading and tennis. Cassettes of historical interest like out-dated newsreels and current news documentaries now are available because of VCR's.

Professional Uses. Many professions use VCR's. Educators videotape courses for students to earn college credit at home.[20] Training programs in government and industry rely on VCR equipment. Instructors and coaches of golf, tennis, skiing, swimming and other sports tape their students' performance to assist them in improving technique. Lawyers videotape depositions,[18] trial practice instructors record student performances for purposes of critique and lectures at bar conferences and continuing legal education courses are recorded and widely disseminated. Flamboyant lecturers like Irving Younger tape and distribute lectures throughout the country, giving thousands of students studying for their bar examinations brief respite from the drudgery of their everyday instruction.[19]

In medicine, videotapes of surgery are preserved for research and treatment purposes (and in anticipation of malpractice litigation). The American Medical Association's Continuing Medical Education Program distributes videotape courses on medical advances to physicians who do not have access to reaching institutions. Medical students receive videotape instruction in such disciplines as radiology, orthopedics, pediatrics and advanced neuroanatomy. At the Georgetown University Medical Center, for example, it is estimated that the average medical student will view videotapes eight times a year.[21] One hospital has developed a program for recording group therapy sessions with adolescent cancer victims. Tapes are later used in the analysis of individual group members, and may be distributed for the benefit of subsequent cancer victims.

In sum, as one representative of the public has urged, "VCR's are useful tools with many functions . . . . no good whatsoever

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[18]Two Presidents have given testimony by videotape: Jimmy Carter to a Grand Jury investigating swindler Robert Vesco and Gerald Ford to the court at the trial of "Squeaky" Fromm for her assassination attempt.

[19]Appendix B reproduces a current brochure of the Bureau of National Affairs, Inc., advertising continuing legal education courses on videotape.

can come from banning" their use. Testimony of Joseph Waz, Deputy Director, National Citizens Committee for Broadcasting, *Hearings on S. 1758 before the Senate Judiciary Committee,* 97th Cong., 1st Sess. 2-3 (November 30, 1981).

III. VCR Owners and Users Were Collusively Excluded From This Case

The Ninth Circuit's decision should be reversed and judgment rendered for petitioners on the merits for the reasons petitioners argue in their brief and *amici* urge above. A separate and independent ground requires reversal of the judgment below and remand for a new trial: the collusive joinder of a defendant to represent only nominally the interests of VCR owners and users.

1.

The principal defendants in this case, "deep pocket" manufacturers and merchandisers of VCR's, are sued only for contributory infringement. Their asserted liability derives from the asserted primary liability of VCR owners and users, see pp. 11-12 *supra.* In contrast, VCR owners are the alleged primary infringers. They, not the manufacturer or seller, decide when and what program to record, and record it. They record in their own homes for the purpose of viewing the same program themselves, with their families and perhaps friends, at another time, and usually only once. They do not sell or rent the recording or use it for any other remotely commercial purpose.

The decision that these uses of VCR's unlawfully infringe copyright affect VCR owners directly and gravely. Each becomes subject to statutory damages of $250 for each film recorded.[20] Each recorded cassette in an owner's home becomes subject to seizure. 17 U.S.C. § 503 (1976). Injunction against future sales of VCR's will prevent upgrading of equipment

[20]In a widely distributed paper, a spokesman for the Motion Picture Association of America has estimated (presumably hyperbolically) that "the recoverable damages would be in the hundreds of billions [sic] of dollars." L. Tribe, *Memorandum of Constitutional Law on Copyright Compensation Issues Raised by the Proposed Congressional Reversal of the Ninth Circuit's Betamax Ruling* at 16 (1981).

presently in service and will deprive prospective VCR owners (the potential market is estimated at 30 million) of the benefits of this new and improving technology. Respondents even seek recall or seizure of VCR's already installed in owners' homes. Pet. App. B 114-15.

Obviously aware how indispensable was owner participation in the case, respondents were careful to join one VCR owner as defendant, William Griffiths. But Mr. Griffiths, himself a client of the respondents' law firm, was a "friendly" defendant, a collusive party who consented to be sued. Respondents waived any claim against him for damages. He had no lawyer (respondents "never expected Griffiths to be represented by counsel"), presented no evidence (except his own testimony on respondents' behalf) and made no argument. Pet. App. B 43-44. In fact, he helped respondents create manufactured evidence of videotape "librarying" by agreeing with respondents' lawyers that he would not erase recordings of two of respondent Universal's films that he otherwise intended to erase. *Id.*

The inescapable conclusion is that the joinder of William Griffiths in the suit was collusive, to satisfy the need for a live VCR "direct infringer" as a defendant – while at the same time avoiding any real defense of VCR owners' interests. For them, indisputable real parties at interest, this was a feigned case. It was an improper vehicle for judicial resolution of important public issues, lacking the "honest and actual antagonistic assertion of rights" indispensable to the adversary process. *United States v. Johnson,* 319 U.S. 302, 305 (1943), *quoting Chicago & Grand Trunk Ry. v. Wellman,* 143 U.S. 339 (1892).

2.

No matter how vigorous the adversary contest between petitioners and respondents, it did not include and could not have included adversary presentation of VCR consumers' position on issues directly affecting them, issues that the Ninth Circuit decided. *See McGowan v. Maryland,* 366 U.S. 420, 429 (1961) (store cannot raise consumers' First Amendment challenge to blue law); *Tileston v. Ullman,* 318 U.S. 44, 46 (1943); *see also United States v. Raines,* 362 U.S. 17, 21 (1960). In sum,

respondents' collusion placed "the public interest . . . at hazard." *United States v. Johnson,* 319 U.S. at 305.

This Court has held consistently that where "friendly" parties have colluded to present an issue, the trial court should dismiss the suit even where another party contests the merits. The leading case is *United States v. Johnson.* There, a landlord enlisted the aid of a collusive tenant to challenge a price control statute that deprived him of the maximum rent on his property. Precisely as in this case, the landlord held the friendly defendant harmless and the defendant in turn neither engaged counsel nor filed a brief contesting the landlord's position. 319 U.S. at 303-04. Even though the government intervened and, like petitioners here, presented an opposing view, this Court held that the case should have been dismissed:

> Such a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated — a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensble to adjudication of constitutional questions by this Court.
>
> Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits. It is the court's duty to do so where, as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them.

319 U.S. at 305 (citations omitted). *See Coffman v. Breeze Corps.,* 323 U.S. 316 (1945) (patent holder may not enjoin indifferent licensee from adhering to federal statute limiting royalties); *Chicago & Grand Trunk Ry. v. Wellman,* 143 U.S. 339 (1892) (courts should not give ruling on the merits in suit involving collusive consumer of railroad's services and the railroad). *See also Congress of Industrial Organizations v. McAdory,* 325 U.S. 472, 475 (1945).

Like *Johnson,* this case should not have proceeded without VCR owners and users as real parties. The courts below failed in

their duty either "to dismiss the cause," *Johnson,* 319 U.S. at 305, or to assure that adequate representatives of consumer interests were joined.

IV. The Decision Below Would Have The District Court Exceed the Powers Granted By Article III of the Constitution

The Ninth Circuit was aware that the issues here are particularly meet for legislative resolution. *See* Pet. App. A 18. It nevertheless suggested as relief a scheme pre-eminently legislative – a compulsory license to record by VCR and a compulsory continuing royalty to be paid to film producers like respondents. *Id.* 28-29; 17 U.S.C. § 111. Indeed, such a scheme is the solution proposed in one of the many bills now being considered by the Congress, the "Mathias Amendment."[21]

A. The Ninth Circuit's Continuing Royalty Scheme Would Be an Unconstitutional Encroachment On Subjects Committed to the Legislative Branch

Respondents could not show below any actual loss recoverable by an accounting. Injunction against sale of VCRs would not profit them at all. The continuing royalty scheme therefore may be respondents' preferred remedy. But whether or not such a redistribution of earnings is economically sound or is wise technological policy is a decision for Congress to make, not the courts.

Questions of patent and copyright policy are expressly confided to the Congress. U.S. Constitution, Article I, § 8. In particular, as this Court has held, such monopoly rights should not be expanded absent the clearest Congressional intent, *Deepsouth Packing Co. v. Laitram Corp.,* 406 U.S. 518, 531, 532 (1972), especially where new industries are concerned. *Parker v.*

---

[21]Amendment No. 1242 to S. 1758 (December 16, 1981) (97th Cong., 1st Sess.). Other bills include H.R. 4783 (October 20, 1981), H.R. 4794 (October 21, 1981), H.R. 4808 (October 21, 1981) and S. 1758 (October 21, 1981) (97th Cong., 1st Sess.).

Flook, 437 U.S.584 (1978). Here a new communications technology has created potential "shifts in current business and consumer relationships . . . Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important porblems in this field, must be left to Congress." *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 414 (1974). Any regulation of the use and economic rewards of VCR technology will affect the future of numerous industries[22] and millions of consumers. Resolving the whethers and hows of compensation to copyright holders "entail[s] extensive factfinding and a legislative, rather than a judicial, judgement." *Teleprompter*, 415 U.S. at 413 n.15. Politics, economics, and the details of technology and science all bear on the proper resolution of the many questions involved; which, as the Court noted in another context, "are delicate, complex, . . . involve large elements of prophecy" and require "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility," long held "to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). *See also Baker v. Carr*, 369 U.S. 186, 210 (1962); *Coleman v. Miller*, 307 U.S. 433, 454 (1939); *The Cherokee Nation v. Georgia*, 5 Pet. 1, 20 (1831).

In other contexts, the Court has struck down lesser intrusion into other branches' realms. These cases demonstrate how unconstitutional the Ninth Circuit's judicially created and administered royalty scheme would be. For example:

In *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442, 444 (1923), the Court declined Congress' invitation "to revise the legislative discretion of the [D.C. Public Utilities] commission . . . and enter the order it deems the commission ought to have made," holding that "[s]uch legislative or administrative jurisdiction . . . cannot be conferred" upon the judicial branch.

---

[22] *E.g.*, the television networks, television broadcast producers, the motion picture industry, VCR manufacturers, manufacturers of VCR accessories such as tapes, VCR distributors and retail and wholesale appliance outlets.

The Court followed *Keller* in *Federal Radio Commission v. General Electric Co.*, 281 U.S.464 (1930), refusing, on Article III grounds, to exercise power Congress sought to confer on the courts to decide whether renewal of a broadcast license would serve the "public convenience, interest and necessity." *Id.* 466. The Court held that the function was "purely administrative," *id.* 467, and that it was improperly called upon to "exercise or participate in the exercise of functions which are essentially legislative or administrative," *id.* 469. In *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952), the D.C. Circuit set licensing conditions and ordered the Federal Power Commission to carry them out. This Court chastised the court of appeals for "usurp[ing] an administrative function" and rendering "an administrative, not a judicial decision." *Id.* 20, 21.[23]

Here too are delicate decisions involving the future of an industry, the development of new technology and transfer of large economic benefits. The Ninth Circuit's proposed royalty scheme would have those decisions made as by a bull in a china shop, when the need is for the interplay of legislative judgments based on all the pertinent information and on effective presentation of the many economic, political and social interests affected.

B. The Courts Cannot Effectively Administer A Judicial Royalty System

Fourteen years ago, in the seminal cable TV case that helped prompt the 1976 amendments to the Copyright Act,[24] the Court declared that it is not the courts' task "to accommodate various competing considerations of copyright [and] communications . . . policy . . . . That job is for Congress." *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 401 (1968). The VCR is a technological analog to cable TV; *see* p. 12, *supra*

---

[23]The principles of these cases still stand. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 580 (1962); FPC v. Transcontinental Gas Pipe Line, 423 U.S. 326, 331-34 (1976).

[24]*See Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. at 414 n.16.

citing *Fortnightly*. After the Court held in *Fortnightly* and *Teleprompter* that the difficult questions at issue were for Congress, not the courts to resolve, Congress acted, established a comprehensive scheme and delegated its detailed regulation to the Federal Communications Commission, 17 U.S.C. § 111. *See Malrite T.V. of New York v. F.C.C.*, 652 F.2d 1140, 1145-46 (2d Cir. 1981).

Instead of following this Court's example in the cable TV cases, the Ninth Circuit here would swamp the District Court with decisions and administrative tasks for which a court is wholly unfitted. The amounts of "royalties" to be collected are speculative. Respondents have been unable to specify their asserted future losses.[25] Pet. App. B 50, 107-15. VCR's may even increase their profits. *Id.*, 112, 113. A court lacks the legislature's ability to marshal expertise in communications, engineering, computer technology, marketing, economics and other disciplines, necessary to make judgments and predictions of harm and especially to evaluate them in money terms. A court is even less capable of determining how and to whom to distribute collected royalties, still less to administer collection and distribution of the money. This kind of judicial policy-making results in piecemeal "emergence of broad policies without any clear legislative guidance." Ladd (U.S. Register of Copyrights), *Home Recording and Reproduction of Protected Works*, 68 A.B.A.J. 41, 43 (1982).

The Ninth Circuit would have the district court become — or create and supervise — a self-defining bureaucracy, acting without legislative standards as it is faced with new products, new communications technology,[29] new methods of broadcast marketing and the like, and without any source of appropriated funds to defray the probable great expense.

---

[25] *See* Note, *Universal City Studios, Inc. v. Sony Corp.: "Fair Use Looks Different on Videotape,"* 66 U. VA. L. REV. 1005, 1024 (1980), *quoted* at Brief of *Amici*, n.17 *supra*, at 19 n.22.

[26] *E.g.*, the backyard satellite dish antenna which can pick up broadcasts from anywhere in the world. How would the district court deal with claims for a royalty share filed by the BBC or Polish National TV?

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

WILLIAM A. DOBROVIR
FRED C. ZACHARIAS
Dobrovir, Oakes & Gebhardt
Suite 1105
1025 Vermont Ave., N.W.
Washington, D.C. 20005
(202) 347-8118

Attorneys for *Amici Curiae*

August 27, 1982

APPENDIX A

Selected Television Programs in the Washington, D.C. Area March 6-12, 1982*

1. *News and public affairs programming*

U.S. House of Representatives Proceedings
Virginia Legislature '82
Community Update
Today's Black Woman
Today
Good Morning America
CBS News (Morning)
MacNeil/Lehrer Report
Phil Donahue
Good Morning Washington
Morning Break
Dick Cavett
Firing Line
Nightly Business Report
Nightline
American Interests
Evening Exchange
Washington Week in Review
Wall Street Week
Agronsky & Company
20/20
NBC Magazine

*T.V. Guide, March 6, 1982 (Washington-Baltimore Edition), at A-13-A-103. Includes broadcasts over WRC, WTTG, WJLA, WDVM, WDCA, WETA, and WHMM in Washington, D.C. and WNVT in Annandale, Va.

Assignment 7
CBS News Sunday Morning
Face the Nation
This Week With David Brinkley
Louis Rukeyser's Business Journal
Meet the Press
Revista
Inside Washington
Everywoman
It's Your Business
Latin Tempo
Open Mind
Over Easy
Great Decisions '82
Common Cents
Lawmakers
Tony Brown's Journal
Black-Stream
Black Forum
Newsweek Bureau Report
Newsprobe
60 Minutes
"Crisis Alert: Agony of East Africa"
"Black Man's Land"
"The Red Army"
"Tenement"
"America's Battle With Crime"
"Frank Terpil: Confessions of a Dangerous Man"
"Behind the Giant"

2. *Scientific programming*

Consultation
Health Field
Richard Simmons

Body Works
"Neuron Suite"
"River of Sand"
"Einstein's Universe"
National Geographic: "Polar Bear Alert"
"The Sharks"
"Cousteau Odyssey"
Life on Earth, Parts 8 and 9
Nova, "Palace of Delights"

3. *Children's programming**

Captain Kangaroo
Great Space Coaster
Wow!
Romper Room and Friends
Sesame Street
Mister Rogers
Electric Company
Krofft Superstars
3-2-1 Contact
Polka Dot Door
Children's Mystery Theater
Walt Disney
Once Upon a Classic
Villa Alegre
Vegetable Soup
Kid's Break
New Voice
Newsbag
Big Blue Marble
Rainbow Patch

*Excludes children's entertainment such as non-educational cartoons.

4. *Religious programming*

Herald of Truth
Directions
For Our Times
World Tomorrow
Jimmy Swaggart
Freedom Revival Hour
700 Club
Day of Discovery
Ever Increasing Faith
Bauman Bible Telecast
Oral Roberts
Jerry Falwell
Rex Humbard
It Is Written
Sunday Mass
Robert Schuller
Hour of Prayer
Jack Van Impe
Jim Bakker
Ernest Angley
Kenneth Copeland
Billy Graham Crusade

5. *Instructional programming*

Morning Stretch
Lilis, Yoga and You
Yoga with Priscilla
Woodwright's Shop
Market to Market
Quilting
This Old House
Small Business Management
Magic of Oil Painting

Basic Banjo
Antiques
Cooking Cheap
Growing Years
Making it Count
Signing with Cindy
Hobby Shop

6. *Artistic, literary and historical programming*

Creativity with Bill Moyers
Profiles in American Art
Kennedy Center Tonight
Over Easy
"Black Contributions"
American Playhouse: "Carl Sandburg – Echoes and Silences"
"For Colored Girls Who Have Considered Suicide/When the Rainbow is Enuf"
"Edwin Hawkins at the Symphony"
"Marx Brothers in a Nutshell"
"Lights! Camera! Annie!"
"Pavarotti: King of the High C's"
"Normal Rockwell's World"
"Lillian Hellman: A Profile"
"Jane Eyre"
"I Remember Nelson," Parts 2 and 3
"Brideshead Revisited," Parts 7 and 8

APPENDIX B

turn to: **The Bureau of National Affairs, Inc.**
Videotape Programs, Suite S-602
1231 25th Street, N.W., Washington, D.C. 20037

I wish to obtain the _____ (date of program)

videotape program for a one-time showing on _____ (date)

and will need approximately _____ coursebooks. Please contact me immediately concerning the estimated shipping charges and other particulars. The address for shipping the program and books (if different from name and address below) is:

_____

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I wish to **purchase** the following audio, videotape programs and/or coursebooks.

☐ Payment enclosed, including applicable state sales tax. (BNA pays shipping charges.)

☐ Bill later, plus shipping charges and applicable state sales tax.

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Videotapes **$750** (includes 1 coursebook)
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Audio Cassettes plus 1 coursebook **$125**
_____ copy/copies of coursebook alone (**$60** per copy. See multiple-copy discount rates listed under Ordering Information.)

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Videotapes **$500** (includes 1 coursebook)
Audio Cassettes **$50**
Audio Cassettes plus 1 coursebook **$100**
_____ copy/copies of coursebook alone (**$60** per copy. See multiple-copy discount rates under Ordering Information.)

Divorce Taxation
Audio Cassettes **$85**
Audio Cassettes plus 1 coursebook **$125**
_____ copy/copies of coursebook alone (**$50** per copy. See multiple-copy discount rates listed under Ordering Information.)

(Please print or type)

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ORGANIZATION _____

ADDRESS _____

CITY _____ STATE _____ ZIP _____

TELEPHONE (AREA CODE) _____

PHONE _____

ORDERING INFORMATION

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All three videotape programs are available for a one-time showing at no rental charge. You need only pay round-trip express shipment costs of the videotapes and purchase a coursebook for each viewer (minimum—10 books), plus shipment and return of unused coursebooks. A coursebook multiple-copy discount of at least 15% is available, as show below.

Coursebook	List Price
Federal Bankruptcy Code	$60
The Trial of an EEO Case	$60
Divorce Taxation	$50

Quantity	Discount
10-24 copies	15%
25-49	20%
50-99	25%
100-499	30%
500-999	35%
1000 or more	40%

Purchase Plan

Federal Bankruptcy Code: Theory Into Practice
Videotape $750 (includes 1 coursebook)
Audio Cassettes $85
$125 (includes 1 coursebook)

The Trial of an EEO Case
Videotape $500 (includes 1 coursebook)
Audio Cassettes $50
$100 (includes 1 coursebook)

Divorce Taxation
Audio Cassettes $85
$125 (includes 1 coursebook)

Format

¾" U-Matic videotape (With advance notice, ½" VHS or Betamax tapes can be provided.)

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This unique, six hour videotape program provides practicing attorneys, accountants, credit managers and other members of the financial community with an in-depth analysis of the Bankruptcy Reform Act of 1978 (the Bankruptcy Code). The program examines in detail the effect of the Code on the bankruptcy court and the rights and role of debtors, but also of creditors and trustees. The emphasis is on consumer bankruptcies. A consumer liquidation case is followed through all its phases—petition filing through case closing. Attention is also paid, however, to business liquidation cases, to business reorganizations under Chapter 11, and to the adjustment of debts of individuals with regular income under Chapter 11.

The program is presented in lecture form by Judge Grady L. Pettigrew, supplemented with discussions, comments, and contributions by and from representatives of banks, credit unions, and other financial institutions. The lecture and discussion are accompanied by visuals of necessary documents in order to enable attorneys and others concerned with bankruptcy proceedings to relate the material to their day-to-day practice.

Judge Pettigrew is a judge of the United States Bankruptcy Court, Southern District of Ohio, Eastern Division. He has served in this capacity since 1977. Before his appointment to the bench, Judge Pettigrew practiced law in Columbus, Ohio, specializing as a trial lawyer in civil litigation. He is an adjunct professor of law at the Ohio University College of Law and the Law School of Capital University. (Length of videotape program—6 hours)

Coursebook list price $60.00 292 pp.

This 1980 videotape program is designed to provide a concise, complete course of equal value to the general practitioner, divorce specialist, and accountant. The course begins with the basics and progresses through the highly sophisticated aspects of tax law, thus offering a thorough briefing for the attorney or tax advisor. Topics covered include: Tax Aspects of Dependency Exemptions, Property Divisions and Their Tax Impact, Tax Planning for Property Transfers, Dividing a Closely Held Business, Estate and Gift Tax Planning for Divorce, Treatment of Retirement Plans and Employment Related Benefits in Divorce, and Deductibility of Legal Fees in Divorce Situations. (Length of videotape program—5½ hours. Videotape available only on rental plan.)

Faculty—Bernice A. Anglea, Anglea & Bidwell, Pasadena, California; Donald J. Gamble, CPA, Arthur Young & Company, Milwaukee, Wisconsin; David H. Hopkins, McDermott Will & Emery, Chicago, Illinois; Leonard L. Loeb, Milwaukee, Wisconsin; Marjorie A. O'Connell, O'Connell & Associates, Washington, D.C.; James J. Pudell, Pudell, Peterson & Pudell, S.C., Milwaukee, Wisconsin; Professor Gary C. Randall, Georgetown University Law School, Spokane, Washington; and John V. Taggart, Windels, Marx, Davies & Ives, New York, New York

Coursebook list price $50.00 336 pp.
(Coursebook on Index 1982 update)

This extensive videotape [illegible] three tapes (10) and [illegible] choice to keep on the [illegible] please refer them to [illegible] of an educational requirement [illegible] appropriate groups of [illegible] analyzing the available [illegible] area, and evaluating [illegible] directed study [illegible] Individual participants are [illegible] what clients, and expert [illegible] to aid legal [illegible] [illegible] of employment.

In addition [illegible] lectures critique the [illegible] demonstration and [illegible] be learned. (Length of [illegible] 10½ hours)

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Amicus Brief

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CLERK

No. 81-1687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SONY CORPORATION OF AMERICA, et al.,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Volunteer Lawyers for the Arts, Inc. as Amicus Curiae in Support of Respondents, Universal City Studios, Inc. and Walt Disney Productions

I. FRED KOENIGSBERG,
Attorney for Amicus Curiae, Volunteer Lawyers for the Arts, Inc.
Sixth Floor, One Lincoln Plaza,
New York, New York 10023
(212) 870-7513

Of Counsel:
BERYL A. ABRAMS
ADRIA G. KAPLAN
JOHN M. KERNOCHAN
OCTOBER 27, 1982

Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 81-1617

SONY CORPORATION OF AMERICA, et al.,

Petitioners,

vs.

UNIVERSAL CITY STUDIOS, INC. and
WALT DISNEY PRODUCTIONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Volunteer Lawyers for the Arts, Inc. as Amicus Curiae in Support of Respondents, Universal City Studios, Inc. and Walt Disney Productions

---

Volunteer Lawyers for the Arts, Inc. ("VLA") submits this brief amicus curiae in support of respondents Universal City Studios, Inc. and Walt Disney Productions. All parties to this suit have given written consent to the filing of briefs amicus curiae. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

VLA is a nonprofit organization that provides, and arranges for, free legal services to artists and arts organizations otherwise unable to afford such services.[1] It also disseminates information about the law to the arts community and works to inform both the legal profession and the public at large regarding the legal problems and needs of artists. VLA is the center for a growing network of similar organizations rendering comparable services across the nation.

VLA's clients include: (1) individual creators—such as authors, screenwriters, dramatists, composers, lyricists, choreographers, stage and screen designers, and photographers; and (2) nonprofit arts organizations—such as small theater and dance companies, film-makers and music groups. All of these clients create, contribute to or produce copyrightable works that are or may be broadcast on television under agreements normally calling for remuneration. These individuals and groups commonly have a continuing economic interest in their works after broadcast.

In the case of an individual creator the continuing economic interest is in: (1) compensation for future uses of the work under contractual arrangements with the television producer or broadcaster; and (2) compensation for future uses of the work by other users. In the case of a nonprofit arts organization, the continuing economic interest is based on copyright ownership of the production, which may be performed publicly, or licensed for performance, reproduction or other purposes. These interests represent significant sources of income for artists and arts

1. VLA is licensed to practice law in the State of New York. It has a roster of almost 800 volunteer attorneys who provide free legal representation to clients meeting VLA's income qualifications.

organizations whose livelihood depends on a fair economic return from the public's use of their works.

The Court of Appeals has ruled below that off-the-air home videotaping of copyrighted works is an infringement of the copyright owner's exclusive "right to reproduce" under Section 106(1) of the Copyright Law and is not excused as a "fair use" under Section 107 of that Law. To reverse either of these rulings and allow uncompensated home taping of broadcasts would harm VLA's individual and organizational clients, as well as other artists and arts groups, and would be contrary to the Copyright Law and its underlying policy.

ARGUMENT

I. Uncompensated home video recording of copyrighted works would have a harmful economic impact on the entire creative community.

The Copyright Law grants to the copyright owner "the exclusive right . . . to reproduce" the copyrighted work. It provides no specific exemption for home video recording;[2] and both the district court and the Court of Appeals, accordingly, devoted attention to the "fair use" provision of the Law (17 U.S.C. § 107).

Section 107 requires analysis of four factors in determining whether a "fair use" has occurred. One factor is "the effect of the use upon the potential market for or value of the copyrighted work" (17 U.S.C. § 107(4)). The Court of Appeals correctly concluded that the infringing activity here, given the cumulative effect of widespread video recording, "tends to diminish the *potential* market for [plaintiffs'] works" (659 F.2d at 974, emphasis in original). See also 3 *Nimmer on Copyright*, § 13.05[E][4][c] at 13-84 (1981).

The harm threatened from home video recording is substantial. It is of deep concern to VLA's clients—the many artists and arts groups unable to afford legal services—and is not limited to more affluent elements of the arts community. The harm weighs strongly against application of "fair use".

Many of VLA's clients are nonprofit arts organizations (*e.g.*, dance and theater companies, orchestras and musical groups) in constant need of new sources of income for their very existence.[3] One source of income is

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2. See 17 U.S.C. §§ 106(1), 108-118.

3. The need for sources of income outside of the public sector is particularly great today given the cutbacks in federal and state funding for the arts. See *e.g.*, the *New York Times*, Sept. 23, 1982 at A19:

(footnote continues on next page)

through licensing of works for performance on commercial, educational or cable television. Typically, a license permits the licensee to broadcast the work a limited number of times over a period of years. If free home video recording of the work were allowed, a licensee would pay less because his audience for the repeat broadcasts would decrease. Thus, the economic benefit to the arts organization would be curtailed, with no payment to compensate for the loss.

Equally important, other markets for the work would be diluted or destroyed altogether. For example, a small nonprofit dance or theater company would be less likely to market a work on videodiscs if copies of the work could be made off the air without compensation. Such a company, whose works have a limited audience to begin with, could not compete with the unauthorized use of its property through home video recording. Again, there would be no payment (direct or indirect) to compensate for the loss from such use.

The individual creators who contribute copyrightable material to motion pictures and television programs would also be harmed. A writer who creates a screenplay "on speculation" in the hope of selling it to a motion picture or television company, or a writer hired by the company to write or rewrite a script, has a continuing interest and potential economic benefit in the final work, even though the copyright in that work is owned by the motion picture company. Under such circumstances, the writer would typically receive, in addition to the initial payments for the work, a fixed percentage of certain revenues from the distribution of the picture for television,

---

(footnote continued from previous page)
"Lower Profits and Economic Uncertainty Threaten Corporate Philanthropy." The article notes that Federal budget cuts in the arts have triggered increased requests for corporate contributions, at a time when corporate contributions are declining. See also American Arts Alliance, *Report from the Board of Directors*, Dec. 1, 1981.

and from exhibition in so-called supplemental markets, such as prerecorded videocassettes, cable television or pay television.[4] Those supplemental markets are already a major source of income to copyright owners and their importance is growing. Because of production costs, the copyright owner depends on reruns for much of the actual profit.[5] The scriptwriter who has residual rights in those reruns or other uses loses income as a result of home copying that cuts into the rerun or other supplemental markets.

Another potential harm to the individual creative artist is that he will receive less when he sells his work. For example, if a motion picture producer expects less revenues from its product by reason of home video recording, that loss will be reflected in lower compensation to the creators of the underlying works—*e.g.*, the screenwriter and composer. Indeed, in this situation the producer may find it less attractive to purchase the rights to a novel or play in the first place.

Because home videotaping is a relatively new technology, it is not yet possible to quantify the amount of harm. But the music recording industry has produced evidence of substantial harm as a result of home audio tap-

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4. See *Writers Guild of America Theatrical & Television Basic Agreement* (1977, amended 1981). Article 15 provides that the writer receives, among other things, "as additional compensation, a pro-rata share of two per cent (2%) . . . of the Company's accountable receipts from the distribution of [a film] on free television."

Article 51 of the Agreement provides, *inter alia*, that a writer will receive "as additional compensation, a pro-rata share of one and 2/10 percent . . . of the company's accountable receipts from the distribution of [the picture in the supplemental markets]."

5. B. Owen, J. Beebe, and W. Manning, *Television Economics* 41 (1974).

ing, and there is every reason to believe that home videotaping will have a similar impact.[6]

Moreover, the harm from free home video recording is occurring in a time of difficult economic conditions for the creative community. The average author earns less than $5,000 a year, the average composer even less, and aid to the arts from the public sector has been severely cut back.[7] Creators simply cannot afford continued free use of their works. Such use cannot be "fair use".

II. Uncompensated home video recording of copyrighted works is contrary to our national copyright policy.

The Court of Appeals reached the only result consistent with the language and purpose of the Copyright Law and the constitutional clause on which the Law rests.[8]

Both the Constitution and the statute seek to ensure that creators will receive a fair economic return for use of their works. The aim is to encourage them to create with

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6. See Statement of F. Hodsoll, Chairman, National Endowment for the Arts, on Copyright Aspects of Video and Audio Recording before the *Subcomm. on Courts, Civil Liberties and Administration of Justice, of the House of Representatives Comm. on Judiciary*, June 24, 1982. See also M. Fishbein, S. Middlestadt and M. Kapp, "A Consumer Survey: Home Taping," (Warner Communications Inc. 1982). This survey shows that in 1980 the market value of home-taped music and other professional entertainment exceeded $2.85 billion. Home tapers would have spent at least an additional $600 million on commercial recordings had home taping not been possible.

7. P. Kingston and J. Cole, *Summary of Findings of the Columbia University Economic Survey of American Authors* (1981); M. Felton, *The Economics of the Creative Arts: The Case of the Composer* (1978).

8. Article I, Section 8, Clause 8, of the Constitution gives Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

some measure of freedom from dependence on patrons, public or private subsidies, or income from other sources. This encouragement of creativity promotes progress in the arts, and so benefits the public.

In the only authoritative commentary we possess on the Copyright Clause, its principal draftsman, James Madison, stated this policy in the clearest terms:

> "The utility of this power [to secure exclusive rights to authors and inventors] will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. *The public good fully coincides in both cases with the claims of individuals.*" The Federalist, No. 43 (emphasis added).

Copyright protection thus is co-extensive with, and indeed identical to, the public interest, and is not a mere matter of grace to be doled out grudgingly. This Court has eloquently confirmed this public interest:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and Useful Arts'. Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954).

The Copyright Law provides the only substantial hope that these purposes will be realized—*i.e.*, that creators can reap a fair share of the income arising from the use or exploitation of their work. As this Court has recognized, the copyright owner "has no real way to demand reimbursement for the use of his property except through

the copyright laws *and* an effective way to enforce those legal rights." *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19 n.32 (1979) (emphasis in original).

For almost 200 years, our national policy has been to extend copyright protection to new kinds and uses of creative works, even when they result from technology not previously envisioned.[9] The current Law embraces "original works of authorship fixed in any tangible medium of expression, *now known or later developed*" (17 U.S.C. § 102(a)), including "motion pictures and *other audiovisual* works." It also sets out in comprehensive terms the copyright owner's exclusive rights (17 U.S.C. § 106) whose violation constitutes infringement (17 U.S.C. § 501(a)). In these broad provisions, Congress recognized that national copyright policy can only remain meaningful if it is applied to new as well as traditional forms and uses. Home video recording is only one recent aspect of a

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9. Extension has been accomplished both by legislation and judicial decision. From the modest first statute of 1790 (1 Stat. 124), covering only maps, charts and books, copyright protection has been broadened, for example, to cover designs, engravings and etchings of prints in 1802 (2 Stat. 171); musical compositions in 1831 (4 Stat. 436); dramatic compositions in 1856 (11 Stat. 138); photographs and negatives in 1865 (13 Stat. 540); paintings, drawing, chromos, statues, statuary and artistic models and designs in 1870 (16 Stat. 198, 212); infringement from mechanical reproduction in 1909 (35 Stat. 1075); motion pictures in 1912 (37 Stat. 488); sound recordings in 1971 (85 Stat. 391); infringement by, *inter alia*, cable television in 1976 (90 Stat. 2541). See text, *supra*, as to the all-embracing character of the 1976 Act. Examples of court decisions applying the copyright laws to new technology are: *Kalem Company v. Harper Brothers*, 222 U.S. 55 (1911) (infringement by dramatization in motion picture); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962) (infringement by reproduction on duplicating machine); *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925) (infringement by radio broadcast). As the court in *Remick & Co.* stated, "the [copyright] statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning."

burgeoning communications technology for exploiting copyrighted works and as such falls squarely within the language and purpose of the 1976 Act.

The artists represented here are not trying to prohibit the consumer from video recording in his living room. Indeed, given the state of technology, they cannot practically prohibit such recording. Affirmance of the Court of Appeals' decision would not, as a practical matter, result in suits against the home user. All that we seek with respect to home use is fair compensation to be paid by the commercial entities making vast sums from the sale of devices that are designed for the very purpose of using the works others have created.

Economic incentives to create are the key to a functioning copyright system. The inevitable result of a diminution in economic incentives for creativity will be a decline in the nation's creative output, which will impede the progress of the arts. As the Chairman of the National Endowment for the Arts has observed, free home videotaping may in the short run appear to be of benefit to the home user, but in the long run the public will *suffer* from a decline in the quantity and quality of programming available.[10] "[T]here is a danger", he stated, "that uncompensated home taping will reinforce the lowest common denominator principle of entertainment and deny fair compensation to our creative artists."

If, as Madison stated, the public good fully coincides with copyright protection to individual creators, the Court of Appeals' decision must stand.

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10. Statement of F. Hodsoll, *supra*.

CONCLUSION

The Court of Appeals' decision should be affirmed.

Respectfully submitted,

/s/ I. Fred Koenigsberg

I. FRED KOENIGSBERG
Attorney for Amicus Curiae Volunteer Lawyers for the Arts, Inc.

Sixth Floor,
One Lincoln Plaza,
New York, New York 10023
(212) 870-7513

Of Counsel:
BERYL A. ABRAMS
ADRIA G. KAPLAN
JOHN M. KERNOCHAN

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No. 81-1687

IN THE

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Petitioners,

vs.

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Respondents.

Brief of Amici Curiae Writers Guild of America, West, Inc.; Writers Guild of America, East, Inc.; Screen Actors Guild, Inc.; and Directors Guild of America, Inc., in Support of Respondents.

PAUL P. SELVIN,
SELVIN AND WEINER,
A Professional Corporation,
By PAUL P. SELVIN,
1900 Avenue of the Stars,
Suite 2400,
Los Angeles, Calif. 90067,
(213) 277-1555,
Attorneys for Writers Guild of America, West, Inc.,

JEROME B. LURIE,
COHN, GLICKSTEIN, LURIE, OSTRIN,
LUBELL & LUBELL,
Attorneys for Writers Guild of America, East, Inc.,

PAUL S. BERGER,
BERGER, KAHN, SHAFTON & MOSS,
Attorneys for Screen Actors Guild,

ELLIOTT L. WILLIAMS,
Attorney for Directors Guild of America, Inc.

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Interest of Amici Curiae.

The above named amici, by their attorneys, respectfully file this Brief of Amici Curiae in support of respondents.*

Amici are the collective bargaining representatives of thousands of individuals who create or contribute to the production of motion pictures and television films. Amici are collectively referred to hereafter as the "talent Guilds." The members of each amicus will be significantly affected by this case. More specifically:

THE WRITERS GUILD OF AMERICA, WEST, INC. and WRITERS GUILD OF AMERICA, EAST, INC., (both

*Consent of the parties has been granted and is on file with the Court.

hereafter simply "WGA") are the collective bargaining representatives for all writers who are employed to write motion pictures and the entertainment portion of television programs. WGA members also sell literary materials for use in motion pictures and television. WGA has over 6,000 members. These writers are the creators of the dramatic shows, series, documentaries, motion pictures, and other programs which dominate television.

THE SCREEN ACTORS GUILD ("SAG") is the collective bargaining representative for all actors who are employed in motion pictures or films for television. SAG has over 50,000 members. These actors appear in the dramatic shows, series, motion pictures, and other programs which dominate television.

THE DIRECTORS GUILD OF AMERICA, INC. ("DGA") is the collective bargaining representative for directors, unit production managers, assistant directors, associate directors and stage managers who are employed in the production of motion pictures and television programs. Motion pictures and television programs cannot be produced without them. DGA has approximately 6,000 members.

Each of the talent guilds has industry-wide agreements with the three major television networks, with all the major motion picture and television producers, and with hundreds of other employers of writers, actors and directors in the motion picture and television industry.

Among the principal concerns of the talent guilds are to insure a fair return to creators of and performers in motion pictures and television and to protect economic benefits which have been achieved through collective bargaining in the unique industry of entertainment film and television. The productive career of many employees in that industry is transient and fleeting. Actors flicker on the screen and many are gone from the network shows in a few seasons; the careers of directors experienced in particular genres are built on the shifting sands of trends and ratings; the literary

creations of writers are devoured in the annual upheavals of network programming and public taste.

Through collective bargaining, and on the premise that the finished product, the film, is protected by copyright, the talent Guilds have provided for compensation to their members for reruns of television films which they have written, directed, or performed in and for additional compensation for the exhibition and rerun over television of motion pictures originally produced for theatrical exhibition. Such compensation is generally known as "residuals." Residuals are, in effect, deferred wages, and are the means for assuring reward for artistic accomplishment and achievement which is permanently captured in film and can be exploited in the future by the owner of the copyright. The product of the artist, like the words of a novelist, endures in the film beyond publication and a single performance, and residuals constitute his reward for the subsequent exploitation of the film. Residuals have been at the heart of the collective bargaining agreements of the WGA, SAG and DGA since the 1950's, and residuals now constitute, for writers, actors and directors, a major source of livelihood.

The talent Guilds believe that the protection of their members' residual payments, and the continued existence of the entertainment industry, are inextricably tied to the protection of the ownership and copyright of motion pictures and television films. The broadest protection of copyright in motion pictures and television films is essential to continued creativity and to the dissemination of entertainment in our society. Protection should be afforded to films which are broadcast over television; they should not be subject to wholesale, free-ride reproduction by the petitioners' devices. The point of view of the talent Guilds is the point of view of the creative community. It is for the preservation of copyright protection.

Summary of Argument.

The Copyright Act permits discrete exceptions to the exclusive rights of the copyright owner. None of those exceptions includes the right of third parties to indiscriminately copy entire copyrighted works by videotaping of the complete works from telecasts made under restricted licenses.

Free speech comes, both philosophically and in time, before public access. Free speech is justified and protected by the widest dissemination of speech, but the public's right to know and the public's right to access are products of the right of free speech, not vice-versa. It undermines the First Amendment and the Copyright Act and places the cart before the horse to argue that the public's right of access compels a surrender or narrowing of the author's copyright.

The Court has approved the protection of an artist's entire performance and work on broad public policy basis. The Copyright Statute is the legislature's express approval of that policy with respect to motion pictures and films.

Creative talent in the film entertainment industry has relied upon the protection afforded to the owners of the copyright by the Copyright Act and by the decisions of this Court. The rewards and compensation of creative talent, and that of numerous other groups and creators, and the survival of the industry itself, rest on the continuation of that protection. Copyright protection insures the diversity of entertainment and intellectual ferment which is indispensable to this society and has long been enforced by this Court.

ARGUMENT.

I.

THE UNAUTHORIZED AND COMPLETE COPYING OF A COPYRIGHTED WORK, ESPECIALLY IN A FORM WHICH IS DESIGNED FOR REBROADCASTING OF THE WORK, IS AN INFRINGEMENT OF THE COPYRIGHT.

A. The Purpose of the Copyright Clause.

Petitioners and their amici make much of the claim that copyright must ultimately benefit the public. Clause 8 of Art. I, Sec. 8 of the Constitution reads:

> "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

What petitioners gloss over is the underlying philosophical premise of Clause 8.

The copyright clause is a recognition that, as in other areas of social endeavor, protection of private property is the best spur to social progress and well-being.[1] An author is rewarded for his labor by the grant of copyright protection, just as the manufacturer of an automobile is rewarded by the enforcement of other property laws. The author and the copyright owner are given this grant because the public will benefit from the creative activities of authors; that is, the copyright monopoly is a necessary ingredient for the creation of literary and artistic works. *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Consequently, although the public interest is paramount, the definition of the author's rights is made

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[1]Motion pictures have been protected by the copyright statutes since the inception of the motion picture industry. The courts found such protection even prior to the Copyright Act of 1903. *Edison v. Lubin*, 122 F. 240, 242 (3rd Cir. 1903); *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 F. 262, 266 (C.C.D.N.J. 1905).

The 1912 Townsend Amendment to the Copyright Act of 1909 made the protection expressly a matter of statute. Act of August 24, 1912, ch. 356, 37 Stat. 488, formerly 17 U.S.C. §5(l) and (m).

by the copyright statute, and not vice versa as petitioners would contend. Stated otherwise: the assertion of the authors' rights under the copyright statutes is not in derogation of the public interest; it is a necessary precondition to the public interest and benefit. Limitations on the authors' rights are determined by the exceptions written into the copyright statute and the fair use doctrine if that doctrine comes into play, not by the First Amendment. Petitioners would bypass the *sine qua non* of progress and permit exploitation of "writings and discoveries" without recognizing the exclusive rights of the authors and inventors.

B. Complete and Wholesale Copying of an Entire Work Is Not Protected by the Fair Use Doctrine.

Petitioners attempt to ride on the shoulders of the fair use exception. 17 U.S.C. § 107. But the fair use doctrine is simply not applicable; it does not extend to the complete and wholesale copying of a work, especially copying in a form which permits subsequent performance and display of the work. See *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937) ("Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use."); and discussion in *Meeropol v. Nizer*, 560 F.2d 1061, 1068-71 (2d Cir. 1977), cert. den. 434 U.S. 1013. Defendants are not free "to film and broadcast a copyrighted dramatic work without liability to the copyright owner." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977).

None of the requirements of the fair use doctrine as established by 17 U.S.C. § 107 can be met by this case. The purpose of reproduction for subsequent home or other rebroadcast or use of dramatic or comedic motion pictures or television programs is wholly different from the purposes permitted and nurtured by the statute. Those purposes the statute carefully delineates to be "purposes such as criti-

cism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," not entertainment. The four factors enumerated in the statute to be considered by the court also all have a cutting edge against permitting the complete copying of motion pictures and television programs.[2]

C. The Trial Court's Findings of No Current Demonstrable Damage Do Not Prevent Relief.

Petitioners contend that no economic harm has been shown by respondents and that consequently the defense of fair use must be upheld. (Petition, pp. 30-31) This argument, like petitioners' First Amendment argument (see II, *infra*) reverses the order of proper analysis. The remarks of David Ladd, United States Register of Copyrights, to the American Bar Association, Section of Patent, Trademark and Copyright Law, August 10, 1982, directly answers petitioners' contentions. We reproduce Mr. Ladd's remarks as an Appendix here. As Mr. Ladd shows, "The bracing sweep of Section 106 rights is there precisely because Congress sought to avoid unanticipated, future, erosions of authors'

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[2]17 U.S.C. § 107 reads in full as follows:

"Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work."

Amici understand that the parties have briefed the scope of these factors and amici therefore do not elaborate on them in this brief.

rights as had occurred under the 1909 Act." See 1965 Report of the Register, as extracted in Mr. Ladd's speech. As he states, "To posit, in any sense, a finding of 'fair use' on the absence of demonstrable present damages is to do nothing less than deprive copyright of any future life."

II.

NO FIRST AMENDMENT RIGHTS OF PETITIONERS OR OF THE PUBLIC ARE RESTRICTED BY AFFORDING RESPONDENTS COPYRIGHT PROTECTION OF THEIR FILMS AS HERE SOUGHT.

A. The Public's "Right to Receive" Is Not in Conflict With Copyright Protection.

The First Amendment is not implicated or threatened in the slightest by upholding the rights of the copyright owners, and the semantic decoration of the issue by petitioners and their amici should not mislead the Court.[3]

The argument is made that there is a paramount "right to receive" which is the determinative weight in deciding whether VCR recording is a fair use. The argument, however, stands the First Amendment and prior precedent on its head.

The public's right to receive is a *raison d'etre* for the right of free speech and for the expansion of diversity in speech, but the cases cited by petitioners and amici do not stand for an absolute right to receive information or enter-

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[3]Petitioners emphasize "time shifting" (*e.g.*, Brief for Petitioners, pp. 4-6; Brief of Amicus Curiae Sanyo Electric, Inc., pp. 2 and 11); "delayed viewing or time shifting" (Brief of Amicus Curiae Pfizer, Inc., pp. 7, 12, 16; Brief of Amici Curiae Minnesota Mining & Mfg. Co., et al., pp. 9, 15, 20-21); "the public's right to receive free off-the-air TV" (Brief for Petitioners, p. 24); the public's "right to receive information and ideas" (Brief of Amici Curiae Minn. Mining & Mfg. Co., et al., p. 11); "the right to receive speech" (Brief of Amici Curiae Virginia Citizens Consumers Council, Inc., et al., p. 5) and "the public's right of access to copyrighted materials" (Brief of Amicus Curiae American Library Assn., p. 10). This improperly camouflages the basic question in this case with the mantle of the First Amendment.

tainment which is independent of or superior to the right of expression. An author cannot be compelled to write, nor an orator to orate, because of the public's right to receive their work or oratory. Rather, it is the author's freedom of speech and his access to the means of communication which are the motor of the First Amendment.

Thus, petitioners' and their amici's use of this Court's rationale in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, especially at 390, is misplaced. The issue in *Red Lion* was the FCC's fairness rule. The fairness doctrine, which promotes diversity of expression and access to the airways, is justified by the needs of viewers and listeners and by the public imperative not to permit monopoly of the airwaves. The critical passage in *Red Lion* reads as follows:

> "... No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.' ...
>
> ... There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.
>
> ... This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with 'the right of free speech by means of radio communication.' Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consist-

> ently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. [citations omitted] It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. [citations omitted]'' (395 U.S. 389-390).

Similarly, a trilogy of cases heavily relied upon by petitioners and their amici rest entirely on a different bottom from this case.

> *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968);
>
> *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974);
>
> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

In each of those cases the audiences receiving the original broadcasts were simultaneously expanded to include additional viewers or listeners; the audience which was enlarged (cable TV, CATV, public place reception) saw or heard the broadcast simultaneously with the audience for whom enlargement was not required. The cases are simply illustrations of the fact that the networks and the broadcasting stations have no control over who listens to or sees their programs when the programs are broadcast. Respondents here similarly have no control, and do not seek it. What is asserted here is the protection of the copyright statutes that the program shall not be copied and replayed thereafter at the whim and discretion of the copier and without compensation to the copyright owner. The issue presented here was not involved in the slightest in *Fortnightly*, *Teleprompter*, or *Aiken*.

Petitioners' and their amici's cases cited in support of the unquestioned right of the public to receive speech are not

copyright cases. The right of the public to receive diverse speech is a reason for societal pressure for the most complete freedom of speech; it is not a defense to a violation of copyright. The public is being restrained from the act of copyright infringement. The public's First Amendment rights are not being infringed. Compare *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965):

> "We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is a factor to be considered in determining whether appellant has been denied due process of law, we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. *The right to speak and publish does not carry with it the unrestrained right to gather information.*" (381 U.S. at 16-17)[4]

B. The Distinction Which Is the Premise of the Copyright Law, Namely, the Distinction Between Ideas and Expressions, Avoids Any Infringement of First Amendment Rights.

The most recent discussions by Courts of Appeals of the alleged copyright-First Amendment dichotomy are con-

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[4]Emphasis has been added to quotations, and footnote references have been omitted, unless otherwise indicated.

tained in *Triangle Publications v. Knight-Ridder*, 626 F.2d 1171 (5th Cir. 1980), (see especially concurring and dissenting opinion by Judge Brown); and *Roy Export Co. v. CBS*, 672 F.2d 1095 (2nd Cir. 1982), (cert. den. Oct. 4, 1982). Judge Newman summarized the prior cases and the rule in the Second Circuit as follows:

> "No Circuit that has considered the question, however, has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine. [Citations][5] In this Circuit, while we have acknowledged in passing the conceivable occurrence of some 'rare,' 'almost unique' circumstance, such as those surrounding the Zapruder film, in which 'it is at least arguable that the informational value of [the] film cannot be separated from the photographer's expression, . . . thereby indicating that both should be in the public domain,' *Iowa State University Research Foundation v. American Broadcasting Cos.*, 621 F.2d 57, 61 n.6 (2d Cir. 1980), we have also stated the general rule that '[c]onflicts between interests protected by the first amendment and the copyright laws thus far have been resolved by application of the fair use doctrine,' *Wainright Securities, Inc. v. Wall Street Transcript Corp.*, *supra*, 558 F.2d at 95." (672 F.2d at 1099)

Judge Brown in *Triangle Publications v. Knight-Ridder*, 626 F.2d 1171 (5th Cir. 1980) concludes that the First Amendment does not come into play because the "idea-

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[5]The cases cited by Judge Newman are: Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979); Walt Disney Productions v. Air Pirates, 581 F.2d 751, 758-59 (9th Cir. 1978), cert. den. 439 U.S. 1132 (1979); Wainright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 95 (2nd Cir. 1977), cert. den. 434 U.S. 1014 (1978).

expression dichotomy'' which underpins all copyright itself provides a workable balance between copyright protection and free speech interests. He relies upon the formulation by the Ninth Circuit and Professor Nimmer. At 1179 of 626 F.2d he states:

> This ''idea-expression dichotomy'' is carried forward in the 1976 Copyright Act. Thus §102(b) makes clear that copyright protection does not extend to the idea itself. This notion is further articulated in the legislative history. For example, the House Report states: ''Wide departures or variations from the copyrighted work would still be an infringement as long as the author's 'expression' rather than merely the author's 'ideas' are taken.'' House Report, at 61; U.S.Code Cong. & Admin.News, at 5675. The ''idea-expression dichotomy'' generally provides a workable balance between copyright and free speech interests. As the Ninth Circuit has stated:
>
> > [T]he idea-expression dichotomy . . . serves to accommodate the competing interests of copyright and the first amendment. The ''marketplace of ideas'' is not limited by copyright because copyright is limited to protection of expression. As one commentator has stated: ''[T]he idea-expression line represents an acceptable definitional balance as between copyright and free speech interests. In some degree it encroaches upon freedom of speech in that it abridges the right to reproduce the 'expression' of others, but this is justified by the greater public good in the copyright encouragement of creative works. In some degree it encroaches upon the author's right to control his work in that it renders his 'ideas' per se unprotectible, but this is justified by the greater public need for free access to ideas as part of the democratic dialogue.'' Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free*

> *Speech and Press*?, 17 U.C.L.A.L.Rev. 1180, 1192-93 (1970). *Cf. Lee v. Runge*, 404 U.S. 887, 892-93, 92 S.Ct. 197 [200], 30 L.Ed.2d 169 (1971) (Douglas, J., dissenting).
>
> *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977).

As Judge Brown points out in his footnote (2), relying on footnote (13) of this Court's opinion in *Zacchini* (433 U.S. at 577-78), "the Supreme Court has given at least its general approval to the 'idea-expression dichotomy' principle."

The result below places no restraint on the public's right to receive television broadcasts. That right remains the same as it was before the advent of VCR. To restrain the public from copying the entire program and replaying it at the public's convenience or commercially does not restrict the public's right to receive any broadcast, and clearly no restraint whatsoever is placed "on the use of an idea or concept." *United States v. Bodin*, 375 F.Supp. 1265, 1267 (W.D. Okla. 1974); *Walt Disney Productions v. Air Pirates*, 345 F.Supp. 108, 115 (N.D. Cal. 1972); *Robert Stigwood Group, Ltd. v. O'Reilley*, 346 F.Supp. 276 (Conn. 1972); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA Law. Rev. 1180 (1980).

In footnote 13 in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577, the Court quoted from *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479, language which makes it clear that it is the copyright statute and not the First Amendment which governs this case:

> "Just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries. States may hold diverse viewpoints in protecting intellectual property relating to invention as they do in protecting the intellectual property relating

to the subject matter of copyright. *The only limitation* on the states is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress . . ."

III.

PROTECTION OF AN ENTIRE PERFORMANCE OR WORK RESTS ON PRINCIPLES EVEN MORE BASIC THAN THOSE CONTAINED IN THE COPYRIGHT STATUTES.

What VCRs record, and what they reproduce and replay for exhibition, are the entire works, the entire expression, the entire product of literary, acting, directing and production creativity. Not ideas alone, but the whole expression, the complete work, is appropriated and reproduced for display at the whim of anyone with a VCR. The copyright statute and even more basic policy prohibit such entire and wholesale reproduction and replay.

Goldstein v. California, 412 U.S. 546 (1973), and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), addressed the question in a different setting.

At the time of *Goldstein*, the copyright law provided no protection to the artist and producer of musical recordings; a recording by Pavorotti, for example, could be reproduced at will by anyone. The State of California moved into the vacuum; California made it a crime to copy without permission the records or tapes of another with the intent to sell the duplicated recordings so made. This Court upheld the statute as not in violation of the copyright act as it then existed or of the supremacy clause of the Constitution. The Chief Justice stated for the majority:

> "But there is no fixed, immutable line to tell us which 'human productions' are private property and which are so general as to become 'free as the air.' In earlier times, a performing artist's work was largely restricted to the stage; once performed, it remained 'recorded' only in the memory of those who had seen or heard it. Today, we can record that performance in

> precise detail and reproduce it again and again with utmost fidelity. The California statutory scheme evidences a legislative policy to prohibit 'tape piracy' and 'record piracy,' conduct that may adversely affect the continued production of new recordings, a large industry in California. Accordingly, the State has, by statute, given to recordings the attributes of property. No restraint has been placed on the use of an idea or concept; rather, petitioners and other individuals remain free to record the same compositions in precisely the same manner and with the same personnel as appeared on the original recording." (412 U.S. at 570-571).

Similarly, the copyright statute evidences a legislative policy to prohibit copying and recording that may adversely affect the continued production of a large industry and activity, namely, the production and distribution of films for motion pictures and television. The owner of the copyright is given the exclusive right to reproduce the film and the numerous other rights afforded by the copyright statute. This is done to advance the greater public good by encouragement of creative works through copyright protection. There is no limitation on the public's free access to or use of ideas or concepts.

In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-577 (1977), this Court stated:

> "Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; for *the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court.* As the Court stated in *Mazer v. Stein*, 347 U.S. 201, 219, 98 L.Ed. 630, 74 S.Ct. 460 (1954):

> 'The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.'
>
> These laws perhaps regard the 'reward to the owner [as] a secondary consideration,' *United States v. Paramount Pictures*, 334 U.S. 131, 158, 92 L.Ed. 1260, 68 S.Ct. 915 (1948), but they were 'intended definitely to grant valuable, enforceable rights' in order to afford greater encouragement to the production of works of benefit to the public. *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 36, 83 L.Ed. 470, 59 S.Ct. 397 (1939). The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer's incentive in order to encourage the production of this type of work. [citations]" (Emphasis added).

The drafters of the Copyright Act of 1976 stated a similar principle to be applied to multitudinous "isolated . . . infringements." In S.R. Rep. No. 94-473, 94th Cong. 1st Sess., at p. 65 (1965), the Senate Committee stated:

> "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright which must be prevented."

Mass infringement by Betamax copying of motion pictures and television programs threatens the industry and all creative personnel in it. The actors, the directors, the writers of such films as "On Golden Pond," "Raiders of the Lost Ark," and "E.T.", to mention but three diverse current films, are entitled to remuneration for their creative efforts. Their contracts with the producer-owners of the copyrights in those films secure such remuneration. Their remuneration

is based upon the owner's exploitation of the copyright; indeed, by virtue of the talent Guilds' collective bargaining agreements, the creative talent employed by the producer shares in the licensing fees derived from subsequent television exhibition of the copyrighted films. Such provisions have been included in each of the talent Cuilds' collective bargaining agreements for approximately 30 years. More recently, talent is entitled to a percentage of receipts from the sale of discs and cassettes of the films.[6] These provisions of the collective bargaining agreements rest upon the continuation of copyright protection of the films.

Motion picture and television films record and preserve the artistic creations of writers, directors and actors, not merely the physical productions of the motion picture and television producers. Copyright protection enables all of the talent which combine in the creation and making of motion pictures and television films to receive a just reward for their creativity. The provisions of the collective bargaining agreements are direct reflections of the societal judgment that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' " *Zacchini, supra*, 433 U.S. at 576.

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[6]Writers Guild of America — AMPTP Agreements of 1977 and 1981, Articles 13, 15, 51.

Directors Guild of America — AMPTP Agreements of 1978 and 1981, Articles 18 and 20.

Screen Actors Guild 1977 and 1980 Basic and Television Agreement (Part V, Sec. 3B, 1980).

In the case of writers who have contributed to the literary material for a motion picture or television film, only those writers who received credit on the screen (a matter also regulated by the collective bargaining agreement) receive residuals. Similarly, only the director who receives credit for directing the motion picture or television film receives residuals and, of course, only actors who have appeared in the motion picture or television film share in residuals based thereon.

Conclusion.

The public good is the long range consequence of the direct and immediate means used by the Copyright Act, namely the protection of the potential for reward for creative production.

The primacy of the First Amendment in fact mandates that the Copyright Act be enforced. It is through the Copyright Act that expression of reasoned and elaborate opinion is promoted. The ideas of political philosophers and of all writers are free to be taken and discussed as the public wishes. Their books, however, and their films, cannot be reproduced in their entirety and by the millions without violation of the Copyright Act. Suppose Locke and Hobbs published and copyrighted "Of Civil Government" and "Leviathan" today. Their ideas could be fully appropriated; but could the books themselves be entirely and freely reproduced without their consent? If Shakespeare wrote "Romeo and Juliet" for the television screen today, and the film was produced at great expense and copyrighted, could millions reproduce it and replay it at their whim?

The doctrine of fair use is not a free ticket to wholesale copying and reshowing of complete motion pictures. The inability of our society to police millions of establishments and homes supports the conclusion that compensation for mass copyright infringement is appropriately to be received from the manufacturers and retailers of infringing devices.

A proper regard for the rights of creators and copyright owners requires no less. The opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

PAUL P. SELVIN,
SELVIN AND WEINER,
A Professional Corporation,
By PAUL P. SELVIN,
Attorneys for Writers Guild of America, West, Inc.,

JEROME B. LURIE,
COHN, GLICKSTEIN, LURIE, OSTRIN,
LUBELL & LUBELL,
Attorneys for Writers Guild of America, East, Inc.,

PAUL S. BERGER,
BERGER, KAHN, SHAFTON & MOSS,
Attorneys for Screen Actors Guild,

ELLIOTT L. WILLIAMS,
Attorney for Directors Guild of America, Inc.

APPENDIX.

Remarks of David Ladd.

United States Register of Copyrights
to the
American Bar Association
Section of Patent, Trademark and Copyright Law.

San Francisco, California — August 10, 1982.

ECONOMIC HARM: A TROJAN HORSE IN COPYRIGHT.

For Release August 10, 1982, 3:00 p.m. EST

Today I'd like to talk about a dangerous concept now emerging as a philosophical basis for copyright protection. This concept — "economic harm" — may alter and could destroy the role of copyright as a principal mechanism for fostering intellectual activity. Historically, there have been various justifications for copyright protection in Anglo-American and other legal systems. Even the most pedestrian explanation, however, cites copyright as an essential incentive to further creation.

The notion that "economic harm" should serve as a basis for copyright is bizarre: its application demands that creators demonstrate economic losses in order to justify copyright. A corollary of this view is that absent a showing of "harm" which is causally related to a particular activity, the activity should not be made subject to proprietary controls under copyright. It's not a hard-and-fast rule yet, but it keeps raising its head.

The *Betamax* litigation and the various Congressional hearings on off-air taping legislation, and the public debate which have attended them, compel us to focus on the meaning of "harm" in copyright. It is important to identify it, assess its significance, and grasp its danger.

Harm is not a separate element of the tort of copyright infringement; to establish a copyright infringement case, one need prove only ownership and copying. (That is often hard enough since proof of copying is frequently inferential.) Nonetheless, "harm," particularly palpable monetary damage, has wrongfully intruded itself into the calculus of liability.

In the *Williams and Wilkins* case, the first reason given by the Court of Claims majority in finding non-infringement was: "Plaintiff has not in our view shown and there is inadequate reason to believe, that it is being or will be harmed substantially by these specific practices. . . ." The *Betamax* trial court's reliance upon this "logic" produced a similarly narrow view of "harm" and imposed upon the plaintiff a burden which drew specific criticism from the Court of Appeals when it reversed the judgment.

A handful of cases do not a body of jurisprudence make; but in photocopying, home taping, and educational uses, we see repeated patterns of argument, of framing issues for resolution. In these areas, the battle lines on present and prospective liability have been drawn, in courts and Congress, around the fourth statutory criterion of fair use: "The effect of the use upon the potential market for or value of the copyrighted work."

Two concepts are embodied in this test of fair use: effect upon "the value" of the copyrighted work and effect upon "potential markets." To be applied in a manner consistent with the fundamental purposes of §106, these two concepts must neither be confused nor merged into a kind of general economic impact analysis. That is *not* what the law calls for.

While the "value" of a copyrighted work obviously could include future uses, I believe the specific reference to "po-

tential'' underscores the need to secure future markets from pre-emption, and leaves their exploitation to the designs of the copyright owner. The import is that potential markets may be as valuable as those presently exploited. Too narrow a view of adverse market impact may simply have the effect of destroying anticipated markets. Consequently, the concept of ''potential market'' in ''fair use'' should be as broad as the exclusive rights in §106 allow.

There are understandable tactical reasons for a defendant to try to saddle a plaintiff with a vague and frustrating ''burden'' to demonstrate actual or potential harm in an infringement case. If, as in *Williams and Wilkins*, the burden goes to establishing a cause of action, the results can be devastating. When the context is the defense of ''fair use,'' then the results can be equally crippling if mere invocation of the defense requires the plaintiff to demonstrate harm.

What interests me about economic harm and the rationale of copyright, however, transcends the confines of a judicial controversy. Economic harm also has been an important element in the Congressional off-air taping debate. It will likely be employed in the context of other technological uses of copyrighted works as well. The legislature, of course, may legitimately consider factors — such as harm — in a manner different from a court. But in either forum any consideration of harm should be based upon certain and definite standards.

There is no satisfactory consensus about the meaning of harm. If the concept is to be treated seriously, the following issues must be confronted:

1. What is meant by *harm*?
2. What kind of harm justifies payment for use of copyrighted works?

3. And who should bear the burden of proof — in the courts or the legislature — the creators who hold broad exclusive rights in their works or those who wish to use them without payment or permission?

Congressional examination of the home taping question has generated a consultants' bonanza in which both sides are trying to establish by survey the presence or absence of harm: how much "librarying" goes on, whether time-shifting devalues broadcast advertising time, or whether there is an "unhealthy" relationship between taping and the emerging cassette rental and sale markets.

If those who are opposed to copyright liability for off-air taping are clamoring for some evidence of "harm" as a prerequisite for legislative relief, it is necessary to ask: "what do you mean by harm?" The answer is not clear. Not even the various possible answers are clear.

Everyone would agree that bankruptcy and massive business failures in copyright industries represent "harm" (at least to the victims). There are, of course, other kinds of harm one can point to: one is a disappointment in earnings from one's present market base. Again, proving a causal relationship between current losses or failures to gain in profitability and a particular activity like home taping is very difficult. General economic conditions, changes in the broadcast market itself — these are much more obvious contributors to making motion picture and television production less profitable.

Another sort of harm is a bit more difficult to categorize: a deterioration of position in regard to future markets, whether those markets are presently anticipated or not. In fact, the thrust of industry arguments in favor of some remuneration and control of home taping has been largely directed toward the future.

This "harm" is quite different from "damages," and it properly reflects both the structure of the Copyright Act of 1976 and the wise way to set policy for the future. Unauthorized off-air taping prejudices the integrity of other emerging markets; it risks limiting the number of outlets from which substantial investments must be recouped.

Section 106 of the 1976 Copyright Act affords copyright owners extremely broad rights, limited only by express exemptions, including "fair use." The bracing sweep of Section 106 rights is there precisely because Congress sought to avoid unanticipated, future, erosions of authors' rights, as had occurred under the 1909 Act. This objective was eloquently explained in the 1965 Report of the Register:

> A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.
>
> For these reasons, we believe that the author's rights should be stated in the statute in broad terms, and that the specific limitations should not go any further than is shown to be necessary in the public interest. In our opinion, it is generally true, as the authors and other copyright owners argue, that if an exclusive right exists under the statute a reasonable bargain for its use will be reached; copyright owners do not seek to price themselves out of a market.

In a judicial context, the concept of "potential market" under use must always be as extensive as the potential markets which broad exclusive rights were intended to secure. To posit, in any sense, a finding of "fair use" on the absence of demonstrable present damages is to do nothing less than deprive copyright of any future life. For the life of the author plus 50 years, an empty right would be provided. And, in

Congress as well, the search for "harm" should consider the decision now embodied in the copyright law: that strong exclusive rights provide the flexibility and protection needed for copyright interests to function in the future.

Underlying the "economic harm" theory of copyright is a more sinister point-of-view: the idea that copyright is mere privilege. That, in the English-American tradition, may have been its origin — copyright and patents as largesse of royal favor. But that is not the function of copyright: It is an instrument of right, around which not only the creation, but the production and distribution of creative works are offered, for acceptance or rejection, by the public. And the right therefore fosters not only creation, but realization, enjoyment, and enrichment. It safeguards the interests not only of authors, but entrepreneurs, investors, artists, and shopkeepers — and ultimately the consumer. Moreover, it increasingly undergirds American preeminence in information and entertainment, and the vitality and viability of the society.

The strains on copyright are great. For the most part, they originate in rapid change in technology and in the order of markets. But the strains are doctrinal and ideological also; and in the preservation of the honored institution of copyright, already tested and vindicated by time, we must be resolute in turning back false doctrine and specious policy.

Docket Sheet

NO. 81-1687-CFX	TITLE Sony Corporation of America, et al., Petitioners v. Universal City Studios, Inc., etc., et al.

DOCKETED	COURT
Mar. 12, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Dean C. Dunlavey
	Counsel for Respondents: Stephen A. Kroft
Mar. 12, 1982	Petition for writ of certiorari filed. (Record filed).
Mar. 22, 1982	Order extending time for respondents Universal City Studios, Inc., and Walt Disney Productions to file a response until May 10, 1982.
Apr. 26, 1982	Brief, amicus curiae, of Sears, Roebuck and Co. in support of petition filed.
May 7, 1982	Brief, amicus curiae, of Motion Picture Association of America in opposition filed.
May 7, 1982	Brief, amicus curiae, for Ad Hoc Committee on Copyright Law filed.
May 7, 1982	Brief, amici curiae, of Minnesota Mining and Manufacturing Company, et al. filed.
May 7, 1982	Brief, amicus curiae, of Consumer Electronics Group of the Electronic Industries Association filed.
May 7, 1982	Brief, amicus curiae, of Pfizer Inc. filed.
May 7, 1982	Brief, amicus curiae, of National Associattion of Retail Dealers of America filed.
May 7, 1982	Brief, amici curiae, of General Electric Company, et al. filed.
May 7, 1982	Brief, amicus curiae, of Sanyo Electric, Inc. filed.
May 7, 1982	Brief, amicus curiae, of TDK Electronics Co., Ltd. filed.
May 7, 1982	Brief, amicus curiae, of CES Publishing Corp. filed.
May 7, 1982	Brief, amicus curiae, of Hitachi, Ltd. and Hitachi Sales corporation filed.
May 7, 1982	Brief, amicus curiae, of Toshiba Corporation and Toshiba America, Inc. filed.
May 7, 1982	Brief, amicus curiae, for the States of Missouri, Alaska, et al. filed.
May 7, 1982	Brief, amici curiae, of Virginia Citizens' Consumer Council, Inc., et al. filed.
May 7, 1982	Brief, amicus curiae, of The American Library Association filed.
May 7, 1982	Brief, amici curiae, of McCann-Erickson, Inc., et al. filed.
May 10, 1982	Brief for respondents Universal City Studios and Walt Disney Productions in opposition filed.
	(Over)

Title

No.

DATE	PROCEEDINGS AND ORDERS
May 10, 1982	Brief, amicus curiae, of National Retail Merchants Association in support of petition filed.
May 10, 1982	Brief, amici curiae, of Writers Guild of America, West, Inc. et al. in opposition to petition filed.
May 10, 1982	Brief, amicus curiae, of Motion Picture and Television Producers and Distributors in opposition to petition filed.
May 10, 1982	Brief, amicus curiae, of CBS Inc., in opposition to the petition filed.
May 12, 1982	DISTRIBUTED. 5-27.
May 24, 1982	Reply brief for the petitioner filed. (D).
June 1, 1982	REDISTRIBUTED. 6-3.
June 7, 1982	REDISTRIBUTED. 6-10.
June 14, 1982	Petition GRANTED.

June 29, 1982	Order extending time to file the joint appendix and petitioners' brief on the merits until Aug. 28, 1982.
Aug. 20, 1982	Joint appendix filed.
Aug. 27, 1982	Brief for the Petitioners filed.
Aug. 27, 1982	Brief, amicus curiae, for the States of Missouri, Alabama, Arkansas, et al. in support of petitioners' filed.
Aug. 27, 1982	Brief, amicus curiae, for Sears, Roebuck and Co. in support of petitioners filed.
Aug. 28, 1982	Brief, amicus curiae, of Pfizer Inc. in support of petition filed.
Aug. 28, 1982	Brief, amicus curiae, of Consumer Electronics Group in support of petitioners filed.
Aug. 28 1982	Brief, amici curiae, of Virginia Citizens' Consumer Council, Inc., et al. filed.
Aug. 28, 1982	Brief, amicus curiae, of The American Library Association filed.
Aug. 28, 1982	Brief, amicus curiae, of Educators Ad Hoc Committee on Copyright Law filed.
Aug. 28, 1982	Brief, amicus curiae, of Viare Publishing filed.
Aug. 28, 1982	Brief, amicus curiae, of Sanyo Electric, Inc. filed.
Aug. 28, 1982	Brief, amicus curiae, of Hitachi, Ltd. and Hitachi Sales Corporation of America filed.
Aug. 28, 1982	Brief, amicus curiae, of National Retail Merchants Association filed.
Aug. 28, 1982	Brief, amicus curiae, on behalf of TDK Electronics Co., Ltd. filed.
Aug. 28, 1982	Brief, amici curiae, of Minnesota Mining and Manufacturing Company, et al. filed.
Aug. 28, 1982	Brief, amici curiae, of General Electric Company, et al. filed.

(Card No. 2).

NO. 81-1687-CFX	TITLE Sony Corporation of America, et al., Petitioners, v. Universal City Studios, Inc., etc., et al.

DOCKETED	COURT
March 12, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
Aug. 28, 1982	Brief, amici curiae, of Toshiba Corporation, et al. filed.
Aug. 28, 1982	Brief, amici curiae, of McCann-Erickson, Inc. et al. filed.
Sept. 8, 1982	Order extending time to file the respondents' brief on the merits until Oct. 27, 1982.
Sept. 30, 1982	Application for leave to file respondent's brief on the merits in excess of page limitations filed.
Oct. 1, 1982	Opposition filed.
Oct. 1, 1982	Order granting same by Rehnquist, J., not to exceed 70 pages.
Oct. 21, 1982	Brief, amicus curiae, of The Authors League of America, Inc filed.
Oct. 25, 1982	Brief, amicus curiae, for The Committee on Copyright and Literary Property of the Association of the Bar of the City of New York filed.
Oct. 27, 1982	Brief for respondents, Universal City Studios, Inc. and Walt Disney Productions filed.
Oct. 27, 1982	Brief, amicus curiae, of Motion Picture Association of America, Inc. filed.
Oct. 27, 1982	Brief, amicus curiae, of Creators and Distributors of Programs filed.
Oct. 27, 1982	Brief, amicus curiae, of The National Music Publishers' Association, Inc. filed.
Oct. 27, 1982	Brief, amicus curiae, of Recording Industry Association of America, Inc. filed.
Oct. 27, 1982	Brief, amicus curiae, of CBS Inc. filed.
Oct. 29, 1982	Brief, amicus curaie, for Volunteer Lawyers for the Arts, Inc. filed.
Oct. 29, 1982	Brief, amici curiae, of Association of American Publishers, Inc., et al. filed.
Oct. 30, 1982	Brief, amicus curiae, of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada filed.
Nov. 1, 1982	Brief, amici curiae, Writer Guild of America, et al. filed.
Nov. 17, 1982	CIRCULATED.
Dec. 3, 1982	Reply brief for the petitioners filed. (D).
Jan. 18, 1983	ARGUED.